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**SELECT CASES**  
**AND**  
**OTHER AUTHORITIES**  
**ON THE LAW OF**  
**PROPERTY**

**BY**  
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**LANGDELL HALL, CAMBRIDGE**  
**PUBLISHED BY THE EDITOR**  
**1923**

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**YRABU! GORRABU!**

## **PREFACE.**

THE professors in the Harvard Law School who conduct the courses given to first-year students have, after conference, decided to make material changes in most of these courses. A statement concerning this will be found in the report of Dean Thayer for the year 1913-1914.

These changes made it desirable that several new case books be prepared. This book is one of such new case books. It is intended for use in the course on property (both personal property and real property) given to first-year students.

E. H. W.

LANGDELL HALL, CAMBRIDGE,  
January, 1915.

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# CASES ON PROPERTY.

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## BOOK I.

### POSSESSION.

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#### CHAPTER I.

#### THE NATURE OF POSSESSION.

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#### SECTION 1.

#### TAKING POSSESSION OF CHATTELS.

##### *A. The Power to Control.*

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#### PIERSON *v.* POST.

3 Caines (N.Y.) 175. 1805.

THIS was an action of trespass on the case commenced in a justice's court, by the present defendant against the now plaintiff. The declaration stated, that Post, being in possession of certain dogs and hounds under his command, did "upon a certain wild and uninhabited, unpossessed and waste land, called the beach, find and start one of those noxious beasts called a fox," and whilst there hunting, chasing and pursuing the same with his dogs and hounds, and when in view thereof, Pierson, well knowing the fox was so hunted and pursued, did in the sight of Post, to prevent his catching the same, kill and carry it off. A verdict having been rendered for the plaintiff below, the defendant there sued out a *certiorari*, and now assigned for error, that the declaration and the matters therein contained were not sufficient in law to maintain an action.

TOMPKINS, J. This cause comes before us on a return to a *certiorari* directed to one of the justices of Queen's County.

The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to, or property in the fox, as will sustain an action against Pierson for killing and taking him away?

The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is

admitted, that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous. *Justinian's Institutes*, lib. 2, tit. 1, sect. 13, and *Fleta*, lib. III, c. II, page 175, adopt the principle, that pursuit alone, vests no property or right in the huntsman; and that even pursuit accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognised by *Bracton*, lib. II, c. I, page 8.

*Puffendorf*, lib. IV, c. 6, sec. 2, § 10, defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and *Bynkershoek* is cited as concurring in this definition. It is indeed with hesitation that *Puffendorf* affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to shew that mere pursuit gave Post no legal right to the fox, but that he became the property of *Pierson*, who intercepted and killed him.

It therefore only remains to inquire, whether there are any contrary principles, or authorities, to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Little satisfactory aid can, therefore, be derived from the English reporters.

*Barbeyrac*, in his notes on *Puffendorf*, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and as far as *Barbeyrac* appears to me to go, his objections to *Puffendorf's* definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to or possession of wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby, the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has de-

prived him of his natural liberty, and brought him within his certain control. So, also, encompassing and securing such animals with nets and toils, or otherwise intercepting them, so as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted, and had in view in his notes, the more accurate opinion of Grotius, with respect to occupancy. That celebrated author, lib. II, c. 8, sect. 3, page 309, speaking of occupancy, proceeds thus, "*Requiritur autem corporalis quædam possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, retibus, laqueis dum quo adsint: primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit, ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf, or Grotius, or the ideas of Barbeyrac upon the subject.

The case cited from 11 Mod. 74-130, I think clearly distinguishable from the present, inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 Salk. 9, HOLT, Chief Justice, states, that the ducks were in the plaintiff's decoy pond and *so in his possession*, from which it is obvious the court laid much stress in their opinion, upon the plaintiff's possession of the ducks, *ratione soli*.

I am the more readily inclined to confine possession or occupancy of beasts *feræ naturæ* within the limits prescribed by the learned authors above cited, for the sake of certainty, and preserving peace and order in society. If the first seeing, starting or pursuing such animals, without having so wounded, circumvented or ensnared them, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation.

However uncourteous or unkind the conduct of Pierson towards Post, in this instance, may have been, yet his act was productive of no injury or damage, for which a legal remedy can be applied. I am of opinion the judgment below was erroneous, and ought to be reversed.<sup>1</sup>

<sup>1</sup> LIVINGSTON, J., delivered a dissenting opinion.

## YOUNG v. HICHENS.

6 Q. B. 606. 1844.

TRESPASS. The first count charged that defendant, with force, etc., seized and disturbed a fishing sear and net of plaintiff, thrown into the sea for fish, wherein the plaintiff had taken and inclosed, and then held inclosed in his own possession, a large number of fish, to wit, etc., and that defendant threw another fishing sear and net within and upon the plaintiff's sear and net, and for a long time, to wit, etc., prevented plaintiff from taking the fish, so taken and inclosed, out of his sear and net, as he could otherwise have done; and drove, etc., the fish; whereby part of them died, part were injured, and part escaped; and the sear and net was injured. Second count, that defendant with force &c., seized, took, and converted fish of plaintiff.

Pleas. 1. Not guilty. Issue thereon.

2. To the first count, as to preventing plaintiff from taking the fish alleged to be inclosed in his possession, and driving, etc., the said fish: that the fish were not plaintiff's fish, and he was not possessed of them, in manner, etc.: conclusion to the country. Issue thereon.

3. To the second count, that the fish were not the plaintiff's fish, in manner, etc.: conclusion to the country. Issue thereon.

On the trial before Atcherley, Serjt., at the Cornwall Spring Assizes, 1843, it appeared that the plaintiff had drawn his net partially round the fish in question, leaving a space of about seven fathoms open, which he was about to close with a stop net; that two boats, belonging to the plaintiff, were stationed at the opening, and splashing the water about, for the purpose of terrifying the fish from passing through the opening, and that, at this time, the defendant rowed his boat up to the opening, and the disturbance, and taking of the fish complained of, took place. The learned Sergeant left to the jury the question of fact whether the fish were at that time in the plaintiff's possession, and also other questions of fact on the other issues. Verdict for plaintiff on all the issues, with damages separately assessed, namely, 568*l.* for the value of the fish, and 1*l.* for the damage done to the net.

LORD DENMAN, C. J. It does appear almost certain that the plaintiff would have had possession of the fish but for the act of the defendant: but it is quite certain that he had not possession. Whatever interpretation may be put upon such terms as "custody" and "possession," the question will be whether any custody or possession has been obtained here. I think it is impossible to say that it had, until the party had actual power over the fish. It may be that the defendant acted unjustifiably in preventing the plaintiff from obtaining

such power: but that would only shew a wrongful act, for which he might be liable in a proper form of action.

PATTESON, J. I do not see how we could support the affirmative of these issues upon the present evidence, unless we were prepared to hold that all but reducing into possession is the same as reducing into possession. Whether the plaintiff has any cause of action at all is not clear: possibly there may be a remedy under the statutes.

WIGHTMAN, J. I am of the same opinion. If the property in the fish was vested in the plaintiff by his partially inclosing them but leaving an opening in the nets, he would be entitled to maintain trover for fish which escaped through that very opening.

(COLERIDGE, J., was absent.)

Rule absolute for reducing the damages to 20s., and entering the verdict for defendant on the second and third issues.

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### STATE v. SHAW.

67 Ohio State, 157. 1902.

EXCEPTIONS to the Court of Common Pleas of Lake County.

The defendants in error were indicted in Lake County for the crime of grand larceny. The indictment is as follows: —

"In the court of common pleas of Lake County, Ohio, of the term of May, in the year of our Lord one thousand nine hundred and one.

"The jurors of the grand jury of the State of Ohio, within and for the body of the County of Lake, duly impaneled, sworn and charged to inquire of crimes and offences committed within the said County of Lake, in the name and by the authority of the State of Ohio, upon their oaths do find and present, that Henry Shaw, John Thomas and James Fostine, late of said county, on the fifteenth day of May, in the year of our Lord one thousand nine hundred and one, with force and arms, in said County of Lake and State of Ohio, unlawfully and feloniously did steal, take and carry away seven hundred and thirty pounds of fish, of the value of forty-one dollars, of the personal property of Morris E. Grow, and John Hough, partners as Grow and Hough, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio."

One of the defendants, John Thomas, was tried separately. On the trial no evidence was offered by the defendant. The evidence offered by the State disclosed that on the morning of May 15, 1901, about 5 or 6 o'clock, a small sail-boat was discovered two or three miles off Fairport harbor; a tug ran out and overhauled this boat and discovered they had fish on board. In reply to an inquiry where they had got the fish they said near Cleveland out of a trap net. They

were asked to come to the harbor with the tug, and refused; two other tugs came to the assistance of the one already there, and brought in the defendants, with their boat, and they were arrested. It is in evidence that on the way in, the defendant, John Thomas, said that "they lifted two pound nets west of the pier and got the fish." The testimony further tended to show that the two pound nets belonged to Grow and Hough, the parties named in the indictment, and that the defendants had taken from these two nets somewhere from 100 to 150 pounds of fish, each. It also appears that the construction of these pound nets is such that the entrance to the net was about thirty-five feet deep, eight rods long, and terminated in an aperture leading into the net, which was two feet and ten inches in diameter. This tunnel, as it is called, extended into the net, or pot, some five or six feet, and the pot was about twenty-eight feet square, reaching, perhaps, four feet above the water. The evidence shows that the opening of the tunnel into the pot was the place where the fish entered, and that it was at all times left open. There is no evidence as to the quantity of fish escaping from the nets; it simply appears that it was possible for the fish to go out in the same way they got in. It was also in evidence that these nets were frequently disturbed by wind and storm, and at such times so disordered that fish escaped over the top. When the state had rested its case the defendant, Thomas, moved the court to arrest the testimony from the jury and direct a verdict of not guilty. The court overruled this motion, but after argument did direct a verdict of not guilty, which was returned by the jury, and to which the state excepted.

DAVIS, J. Fish are *feræ naturæ*; yet, "where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for food of man and dead, reclaimed (and known to be so) or confined." . . . "Fish confined in a tank or net are sufficiently secured." 2 Bishop, Cr. Law, sect. 775.

The trial judge seems to have directed the jury to return a verdict of "not guilty" on the theory that the fish must have been confined so that there was absolutely no possibility of escape. We think that this doctrine is both unnecessarily technical and erroneous. For example, bees in a hive may be the subject of larceny, yet it is possible for the bees to leave the hive by the same place at which they entered. To acquire a property right in animals *feræ naturæ*, the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large. When he has confined them within his own private enclosure where he may subject them to his own use at his pleasure, and maintains reasonable precautions to prevent escape, they are so impressed with his proprietorship that a felonious taking of them from his enclosure, whether trap, cage, park, net, or whatever it may



be, will be larceny. For such cases, as is clearly shown by the authorities above quoted, the law does not require absolute security against the possibility of escape, and none of the authorities cited for the defendants in error, except *Norton v. Ladd*, 5 N.H. 203, sustain their contention. *Young v. Hichens*, 6 Ad. & Ell., N.S., 606; s. c., 51; E. C. L. 606, is not applicable to this case. That was an action for the conversion of fish which were never in the plaintiff's net, but had been frightened away from entering into the plaintiff's net by the defendant and caught in his own net.

In the present case the fish were not at large in Lake Erie. They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was practically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape. The fish that were taken had not escaped, and it does not appear that they would have escaped, or even that they probably would have escaped. They were so safely secured that the owners of the nets could have taken them out of the water at will as readily as the defendants did. The possession of the owners of the nets was so complete and certain that the defendants went to the nets and raised them with absolute assurance that they could get the fish that were in them. We think, therefore, that the owners of the nets, having captured and confined the fish, had acquired such a property in them that the taking of them was larceny.

*Exceptions sustained.*

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GHEN v. RICH.

8 Fed. Rep. 159. 1881.

NELSON, D. J. This is a libel to recover the value of a fin-back whale. The libellant lives in Provincetown and the respondent in Wellfleet. The facts, as they appeared at the hearing, are as follows: —

In the early spring months the easterly part of Massachusetts Bay is frequented by the species of whale known as the fin-back whale. Fishermen from Provincetown pursue them in open boats from the shore and shoot them with bomb-lances fired from guns made expressly for the purpose. When killed they sink at once to the bottom, but in the course of from one to three days they rise and float on the surface. Some of them are picked up by vessels and towed into Provincetown. Some float ashore at high water and are left stranded on the beach as the tide recedes. Others float out to sea and are never recovered. The person who happens to find them on the beach usually sends word to Provincetown, and the owner comes to the spot and removes the blubber. The finder usually receives a small salvage for his services. Try-works are established in Province-

town for trying out the oil. The business is of considerable extent, but, since it requires skill and experience, as well as some outlay of capital, and is attended with great exposure and hardship, few persons engage in it. The average yield of oil is about twenty barrels to a whale. It swims with great swiftness, and for that reason cannot be taken by the harpoon and line. Each boat's crew engaged in the business has its peculiar mark or device on its lances, and in this way it is known by whom the whale is killed.

The usage on Cape Cod, for many years, has been that the person who kills a whale in the manner and under the circumstances described, owns it, and this right has never been disputed until this case. The libellant has been engaged in this business for ten years past. On the morning of April 9, 1880, in Massachusetts Bay, near the end of Cape Cod, he shot and instantly killed with a bomb-lance the whale in question. It sunk immediately, and on the morning of the 12th was found stranded on the beach in Brewster, within the ebb and flow of the tide, by one Ellis, seventeen miles from the spot where it was killed. Instead of sending word to Provincetown, as is customary, Ellis advertised the whale for sale at auction, and sold it to the respondent, who shipped off the blubber and tried out the oil. The libellant heard of the finding of the whale on the morning of the 15th, and immediately sent one of his boat's crew to the place and claimed it. Neither the respondent nor Ellis knew the whale had been killed by the libellant, but they knew or might have known, if they had wished, that it had been shot and killed with a bomb-lance, by some person engaged in this species of business.

The libellant claims title to the whale under this usage. The respondent insists that this usage is invalid. It was decided by Judge SPRAGUE, in *Taber v. Jenny*, 1 Sprague, 315, that when a whale has been killed, and is anchored and left with marks of appropriation, it is the property of the captors; and if it is afterwards found, still anchored, by another ship, there is no usage or principle of law by which the property of the original captors is diverted, even though the whale may have dragged from its anchorage. The learned judge says:—

“When the whale had been killed and taken possession of by the boat of Hillman (the first taker) it became the property of the owners of that ship, and all was done which was then practicable in order to secure it. They left it anchored, with unequivocal marks of appropriation.”

In *Bartlett v. Budd*, 1 Low. 223, the facts were these: The first officer of the libellant's ship killed a whale in the Okhotsk Sea, anchored it, attached a waif to the body, and then left it and went ashore at some distance for the night. The next morning the boats of the respondent's ship found the whale adrift, the anchor not holding, the cable coiled round the body, and no waif or irons attached

to it. Judge LOWELL held that, as the libellants had killed and taken actual possession of the whale, the ownership vested in them. In his opinion the learned judge says:—

“A whale, being *feræ naturæ*, does not become property until a firm possession has been established by the taker. But when such possession has become firm and complete, the right of property is clear, and has all the characteristics of property.”

He doubted whether a usage set up but not proved by the respondents, that a whale found adrift in the ocean is the property of the finder, unless the first taker should appear and claim it before it is cut in, would be valid, and remarked that “there would be great difficulty in upholding a custom that should take the property of A. and give it to B., under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit.” Both the cases cited were decided without reference to usage, upon the ground that the property had been acquired by the first taker by actual possession and appropriation.

In *Swift v. Gifford*, 2 Low. 110, Judge LOWELL decided that a custom among whalers in the Arctic seas, that the iron holds the whale, was reasonable and valid. In that case a boat's crew from the respondent's ship pursued and struck a whale in the Arctic Ocean, and the harpoon and the line attached to it remained in the whale, but did not remain fast to the boat. A boat's crew from the libellant's ship continued the pursuit and captured the whale, and the master of the respondent's ship claimed it on the spot. It was held by the learned judge that the whale belonged to the respondents. It was said by Judge SPRAGUE, in *Bourne v. Ashley*, an unprinted case referred to by Judge LOWELL in *Swift v. Gifford*, that the usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and he added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, this objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one engaged in the trade.

In *Swift v. Gifford*, Judge LOWELL also said:—

“The rule of law invoked in this case is one of very limited application. The whale fishery is the only branch of industry of any importance in which it is likely to be much used, and if a usage is found to prevail generally in that business, it will not be open to the objection that it is likely to disturb the general understanding of mankind by the interposition of an arbitrary exception.”

I see no reason why the usage proved in this case is not as reasonable as that sustained in the case cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature

of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in *Taber v. Jenny* and *Bartlett v. Budd*. If the fisherman does all that it is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the libellant.

The rule of damages is the market value of the oil obtained from the whale, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion. As the question is new and important, and the suit is contested on both sides, more for the purpose of having it settled than for the amount involved, I shall give no costs.

*Decree for the libellant for \$71.05, without costs.*

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### HOLLISTER v. GOODALE.

8 Conn. 332. 1831.

THIS was an action of trespass for taking and carrying away a barouche and harness.

The cause was tried at Hartford, February term, 1831, before PETERS, J.

The claim of the plaintiff for the harness, was abandoned at the trial; and the controversy regarded the barouche only. Both the plaintiff and the defendant were constables of the town of Glastonbury, and claimed to have taken this property, under different writs of attachment, issued against Henry Benton; and the issue turned on the priority of service.

On the part of the plaintiff, it was claimed, that the barouche was in Benton's carriage-house, the door of which was fastened by a padlock; that the plaintiff, having lawfully obtained the key, went to the carriage-house, unlocked the door, and attached the barouche, declaring that he attached all the carriages and harnesses in the carriage-house; and that while he was attempting to remove the barouche, the defendant forcibly took it from his possession, and afterwards sold it at the post.

On the other hand, it was claimed by the defendant, that he went with his attachment near the carriage-house, and concealed himself; that when the plaintiff unlocked the door, the defendant first entered, and attached the barouche; that the plaintiff neither attached the property, nor took possession of it; and that some time afterwards, the defendant returned to the carriage-house, and attached the harness and removed it.

The judge charged the jury, that if the plaintiff was at the carriage-house before the barouche was attached by the defendant, and had a writ of attachment in his hands, and the key of the carriage-house in his possession, and was unlocking the door, at the same time declaring that he attached the property; he thereby obtained the custody and possession of it; and that this, without an actual touching of it, constituted an attachment of it.

The plaintiff obtained a verdict; and the defendant moved for a new trial for a misdirection.

HOSMER, Ch. J. The enquiries in the case are, what constitutes a legal attachment; and whether on this subject the charge was correct.

1. The word *attach*, derived remotely from the *Latin* term *attingo*, and more immediately from the *French* *attacher*, signifies to take or touch, and was adopted as a precise expression of the thing; *nam qui nomina intelligit, res etiam intelligit*.

The only object of attachment is to take out of the defendant's possession, and to transfer into the custody of the law, acting through its legal officer, the goods attached, that they may, if necessary, be seized in execution, and be disposed of and delivered to the purchaser. From both these considerations it is apparent that to attach is to take the *actual* possession of property. Hence, the legal doctrine is firmly established that to constitute an attachment of goods the officer must have *the actual possession and custody*. It was laid down in these express words, by Ch. J. PARSONS, in *Lane et al. v. Jackson*, 5 Mass. Rep. 157, 163, and by Ch. J. PARKER, in *Train v. Wellington*, 12 Mass. Rep. 495, 497. Nor is there, so far as my investigations have enabled me to discover, a single determination opposed to the preceding principle.

The case of *Turner v. Austin*, 16 Mass. Rep. 181, decided that no overt act by the sheriff was necessary to constitute an attachment of property, previously in his custody on another attachment. But this is entirely consistent with the principle advanced. The sheriff already had the actual custody; and mere form or ceremony, *for form's sake*, and not for the preservation of substance, can never be required.

It was likewise adjudged in *Denny v. Warren*, 16 Mass. Rep. 420, that an officer, who entered a store to attach goods, where there was no competition, received the key from the clerk, and locked up the store, having declared his intention to attach, had made a sufficient

attachment. And in *Gordon v. Jenny*, 16 Mass. Rep. 465, the determination was to the same effect.

So in *Naylor v. Dennie*, 8 Pick. 198, it was decided that inaccessible goods, covered up in the hold of a ship, were attached, by the officer's going on board, and leaving a keeper to take care of them; and in *Merrill v. Sawyer*, 8 Pick. 397, that hay in a barn was duly attached, by putting a notification of the attachment on the barn door.

Now, in all these cases, the court went on the principle, that the actual possession and custody was necessary to constitute an attachment; although there being no race for priority of attachment, they held that to be the actual custody and possession, which, perhaps, was constructive possession only.

The analogous cases all demonstrate the necessity of actually taking the property. This is the established law concerning the levy of executions; that is, the property levied on is actually taken into the custody of the law. So when an attachment or execution is levied on the body, it is effected by a corporal seizing or touching of the body, and thus putting it in the custody of the law (3 Bla. Comm. 288); or by what is tantamount, a power of taking possession and the party's submission thereto. *Genner v. Sparkes*, 1 Salk. 79; *Horner v. Battyn*, Bul. N. P. 62. But if the person do not submit (and this dead property cannot do), the body must actually be seized.

2. The question now arises, in view of the preceding facts and principles, whether the charge to the jury was correct.

That the plaintiff was at the door of the carriage-house, with a writ of attachment in his hand, only proves his intention to attach. To this no accession is made, by the lawful possession of the key and the unlocking of the door. Suppose what does not appear, that the key was delivered to him, by the owner of the barouche, that he might attach the property; this would be of no amount. He might have the constructive possession, which, on a sale, as between vendor and vendee, would be sufficient; but an attachment can only be made by the taking of actual possession. As little importance is attached to the unlocking of the door, and the declaration that the plaintiff attached the carriage. This was not the touching of the property, or the taking of the actual possession. The removal of an obstacle from the way of attaching, as the opening of the door, is not an attachment, nor was the verbal declaration. An attachment is an act done; and not a mere oral annunciation. From these various acts, taken separately or conjointly, the plaintiff did not obtain the possession and custody of the barouche, and therefore he did not attach the property.

On the contrary, if the facts contended for, by the defendant, were proved, his defence was complete. Between two officers having separate attachments, there was a race for priority. They both had

arrived at the carriage-house; and, as soon as the door was opened, the defendant outstripped his competitor, and seized on the barouche. By this act, he had the actual possession, and was successful in his intended prior attachment.

I would, therefore, advise a new trial of the cause.

DAGGETT and WILLIAMS, Js., were of the same opinion.

PETERS, J., was also inclined to concur, though he was not quite satisfied that the charge was wrong.

BISSELL, J., was absent.

*New trial to be granted.*

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### HUNTINGTON v. BLAISDELL.

2 N.H. 317. 1820.

THIS was trespass *de bonis asportatis* for a quantity of household furniture. The defendants pleaded, first, not guilty; and, secondly, that Blaisdell, as a deputy sheriff, and the other defendants, as his assistants, took and removed the furniture as the property of one Luther Delano, against whom Blaisdell had a writ of attachment in favor of Josiah Barnes. The plaintiff joined the general issue, and to the special plea replied, that the title to the furniture at the time of the removal was in him and not in Delano.

On the trial here in November, A.D. 1819, it appeared in evidence, that both of the principal parties in this case were deputy sheriffs; that, on the day of the alleged trespass, each, having precepts against Delano, rode with considerable speed towards his house; that the plaintiff first obtained admission into it; and then gave notice that he attached all the furniture therein; that he immediately laid his hands on some of it, and proceeded to make out an inventory of the whole; that while thus engaged, not having locked the doors of the house, Blaisdell entered, and before Huntington had reached a chamber where was the property named in the writ, proceeded to take and remove from that chamber, by virtue of the precepts in his possession, all the articles described.

There was some evidence, however, that one bed was taken by Blaisdell from a different apartment, and the fact as to which person first entered the chamber being questioned, it was submitted to the jury and found for the defendants.

A general verdict was then, by consent, taken for the plaintiff for the value of the furniture, subject to future consideration.

WOODBURY, J. If a sheriff makes a valid attachment of property, he certainly acquires such an interest in it as to be able to maintain trespass against one who removes it from his possession. *Poole v. Symonds*, 1 N. H. Rep. 289.



In this case then, the only difficulty is to determine whether Huntington, at the time when this property was removed by the defendants, had made such an attachment of it. To constitute a valid attachment it is contended that the articles must be actually touched or handled by the officer. It cannot be questioned, that to constitute an arrest of the body, some part of the officer must come in actual contact with some part of the person who is arrested. 1 Salk. "Arrest."

It is not sufficient to be in sight or hearing. An attachment of property is an arrest, or seizure, or taking of it; and consequently would seem to be defective, unless the property be touched. In this case, it is not necessary to deny the premises, nor to attack the analogy between an arrest and an attachment. The merits of this case lie in the principle, that articles of property from their number and nature can be taken or delivered without an actual touching or removing of every distinct article.

Thus, in respect to real estate, the delivery of seisin or possession is by touching only a handle of the door, or a twig or the turf of the land. An attachment of land, or a pew in a church, may now be effected in the same way. 13 Mass. Rep. 123.

In respect to personal estate, when sold, a delivery of a sample is a delivery of the whole; and touching a part as for the whole, or taking into actual custody a building, or the key of it, so as to have the whole contents under one's control, is a receipt, or taking of the whole. 10 Mass. Rep. 308; 12 ditto, 300; 1 East, 192; 7 ditto, 558; *Willes et al. v. Ferris*, 5 John. 344. So, "if a landlord comes into a house and seizes upon some goods as a distress in the name of all the goods in the house, that is a sufficient seizure of all." Bac. Ab. "Distress" D. An attachment of personal estate can therefore be effected in the same way. The whole articles must doubtless be within the power of the officer. 16 John. 288; *Haggerty v. Willer*, 13 Mass. Rep. 116. That is, they must not be inaccessible to him by their distance, or, by being locked up from his reach in an apartment not under his control; or by being so covered with other articles, or so in the custody of another person, that the officer cannot see and touch them. Mass. Rep. 157, 163, 271. The officer must also continue to retain this power over them, by remaining present himself, by appointing an agent in his absence, by inventorying and marking them, or by a seasonable removal of them. 9 John. 132-3; 16 ditto, 288; *Bradley v. Windham*, 1 Wils. 44; 12 Mass. Rep. 131, 495; 14 ditto, 190, 356; 15 John. 428. The law in respect to a distress for rent is somewhat analogous. Str. 717; 2 Ld. R. 1424; 2 Dall. 67.

In the present case, the articles were all within one house; the plaintiff first entered that house and touched some of the furniture and gave notice that he attached the whole; he then proceeded to inventory the whole; remained within the house and could have closed the doors if wishing to be absent. He, therefore, had control

over the whole and retained that control till the defendants entered and by force divested him of it.

Consequently the attachment was valid, and judgment must be entered on the verdict.

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DENNY v. WARREN.

16 Mass. 420. 1820.

THIS was an action of trover, to recover the value of certain goods mentioned in the declaration; and was tried upon the general issue, at the last April term in this county, before WILDE, J.

On the part of the plaintiff, a deputy sheriff of this county, it was in evidence, that on Saturday the 28th of November, 1818, there was delivered to him a writ of attachment in favor of one Samuel Kettle against one Aaron Morse, with directions to secure the demand declared in the writ: that he went to the store of Morse, who was a trader in Worcester, about two o'clock in the afternoon of said day; that he continued there until sunset, Morse being absent, and a number of people being collected. The business of the store was conducted by one Whiting, clerk to Morse. In the course of the afternoon the plaintiff informed a person, who was a witness at the trial, that he had a writ against Morse, and had attached, or was about attaching, all the goods in the store. The witness observed to him that it would be a pity to remove the goods, and that, as he was going to the place whither Morse was gone, he should probably meet him, and would inform him of the plaintiff's business; adding that Morse might procure a receipt for the goods. The plaintiff remained at the store until after sunset, the said Whiting continuing to sell goods, as they were called for, through the afternoon; the plaintiff observing to him about sunset, that if he sold much more, there would not be enough left for him. Whiting locked the store before it was dark, and delivered the key to the plaintiff, who immediately left the place; Morse returning about fifteen minutes after.

The defendant was also a deputy sheriff, and claimed the goods in virtue of an attachment of them upon a writ in favor of one Barber against the said Morse. On the defendant's part, it was proved that, early in the morning of Monday, the 30th of November, he went to Morse's house, and made known his business, an agent of Barber being with him, and that Morse showed the defendant the goods in question, who attached and removed them, a part of them having been removed into another building than the store. The defendant knew nothing of the plaintiff's doings, but Barber's agent was knowing thereto.

The defendant objected that the attachment made by the plaintiff

was not valid, because he did not remove the goods from the store; and that he had sufficient opportunity to have done it on the 28th, if he had not waited for Morse's return, as before stated.

The jury were however instructed, that the attachment made by the plaintiff must be considered valid in law, if they believed his return thereof upon the writ to be true; and that the delivery of the key of the store, under the circumstances of the case, was equivalent to a removal of the goods, and vested a special property in them in the plaintiff. The defendant objected to this instruction, and if the objection was well founded, in the opinion of the court, the verdict for the plaintiff was to be set aside, and a new trial granted, or the plaintiff become nonsuit, as the court should direct. Otherwise judgment was to be entered upon the verdict.

PARKER, C. J. The plaintiff having been in the store, within view of the goods, and with the power to remove them, must be considered as having attached them; he having a writ for that purpose, and declaring his intention, but suspending the removal of them for the convenience of the debtor. In this situation, the delivery of the key to him by the clerk was the same as if it had been delivered by the debtor himself; for, in his absence, the acts of the clerk for the benefit of the master ought to be construed the acts of the latter.

When the defendant took possession of the goods, they were already in the custody of the law; and although no keeper was placed over them, yet the possession of the first attaching officer could not be lawfully disturbed by any one knowing that an attachment had taken place.

If negligence, or a voluntary abandonment of the attachment, had appeared, the case would be different. But the goods were locked up on Saturday night, and, for aught appearing, the plaintiff would have taken them into his actual possession early on Monday morning; but was prevented by the act of the defendant. This act, although, perhaps, justifiable without knowledge of what had been before done, could not be so with the knowledge which the agent of the plaintiff in the second action had of the past proceedings.

The case shows collusion between the debtor and the second attaching creditor, to defeat the first attachment; and, although fraud has not been directly found by the jury, they have found facts which render the inference of fraud necessary. The defendant could not have entered the store without the assistance of the debtor; and some of the goods had been removed from the store, he knowing of the attachment. Upon the whole case, we think the verdict is well maintained by the evidence.

*Judgment on the verdict.*

NOTE. — In *Merrill v. Sawyer*, 8 Pick. (Mass.) 397, the court said: "The attachment made by the plaintiff on Saturday was valid.

. . . He went within view of the hay with his writ, declared that he attached it, and posted a notification to that effect on the barn-door. There was then no person present claiming the possession of the hay." And see *Corniff v. Cook*, 95 Ga. 61, 65.

In *Fountain v. 624 Pieces of Timber*, 140 Fed. Rep. 381, the court said: "The undisputed evidence shows that the deputy sheriff, who had the attachment in hand for execution, made no valid levy on the timber. It was in a raft moored in a public boom, of which Gaines Fountain was the proprietor or manager. The deputy sheriff, in company with said Fountain, approached the raft in a boat, and came within some 60 feet of it, when, it being pointed out by Fountain among other rafts, the deputy sheriff viewed it. He did not go on to it, or then ascertain the exact number of pieces of timber there was in the raft; but he informed Fountain that he had the attachment, and engaged Fountain to count the exact number of pieces of timber there were in the raft and to report the same to him, which was subsequently done." And see *Adler v. Roth*, 5 Fed. Rep. 895; *Libby v. Murray*, 51 Wis. 371.

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### RIX v. SILKNITTER.

57 Iowa, 262. 1881.

DAY, J. The execution under which the defendant acted is in due form. The only question involved pertains to the sufficiency of the levy. The evidence is not contained in the abstract and the case must be determined upon the facts as found by the court.

The court submitted a finding of facts and of legal conclusions substantially as follows: "That on the . . . . . day of . . . . . 1879, in company with M. H. Kirkham, of the firm of Drake & Kirkham, execution plaintiffs, the defendant went to the foundry of the execution defendants, which was at the time being invoiced to be turned over to the Centerville Foundry Company; that the said Kirkham directed the defendant, who was sheriff of Apanoose County, Iowa, and held the execution as sheriff aforesaid, to levy on the execution defendant's property, situated in and about the foundry, including the patterns in dispute; that the execution defendant, B. A. Ogle, of said firm of Gilman & Ogle, was present when the sheriff commenced to make such levy, and was informed by the sheriff that he had the writ, and that he levied on the property and was proceeding to and was levying the writ while said defendant was present, but the defendant left before the levying was completed, directing one of his hands to assist him in handling the property and examining it, and turning his hand over to the sheriff's direction; that the defendant undertook to levy on all the patterns in said foundry, and

belonging to said foundry, which included a large number of patterns situated in a building on the premises, but separated and distant from fifty to one hundred feet from the main building, which was locked, the key in the possession of the said Ogle aforesaid; that the sheriff did not open this house and take actual possession of the patterns, in this out building, but took possession and control of all the other goods in and about the foundry mentioned in the return on the writ, and assumed to take possession and control of the patterns in the out building aforesaid, and that he then told W. S. Johnson, a member of the company to whom the premises were being turned over and invoiced as aforesaid, who wrote and took the acknowledgment of the mortgage of plaintiffs, that he would not remove the patterns and the goods levied upon, mentioning the same and including the patterns and all the patterns belonging to the foundry, which included the patterns in said out building, if he would hold the same and be responsible for them, otherwise he would remove them. And the said Johnson agreed to be responsible for the same and they were accordingly left in his control and care.

"That the actual possession of said out building was not at this time turned over to the said W. S. Johnson or the company of which he was a member, but he was in possession of the balance of the premises actually; that the patterns aforesaid were of the actual value of fifteen hundred dollars. That the aforesaid facts constitute a legal and valid levy upon all the property mentioned in said return, including the patterns situated in said out building; that on the same day but after the levy aforesaid, the said Gilman & Ogle executed and duly acknowledged the chattel mortgage set forth in the pleading to secure the debt therein named, which remains wholly unpaid, and that there is due thereon the amount set forth therein, as evidenced by the note described therein, to wit, the sum of..... dollars; and the court finds said mortgage was duly filed, indexed and recorded on the day after the date thereof, as shown by the mortgage, and that the mortgagors on that day wrote the plaintiffs of the execution thereof at Keokuk, where they resided, and the plaintiffs replied thereto on the next day, when it was received, accepting the mortgage, but that all this, including the execution and recording of the mortgage, occurred after the aforesaid levy; that the defendant never was in said out buildings where the patterns were stored as aforesaid and never handled the same until the day of the sale, and on that day the building was opened and the property exposed to sale by the sheriff and sold by him, but not disturbed or removed by him other than in causing the opening of the building for the purpose of examination and sale, and in selling the same."

The evidence is silent as to what W. S. Johnson did with the property while he held it for the sheriff. The court erred we think in holding that the facts found constituted a valid levy upon the

property in controversy. In order to make a legal and valid levy the officer must do such acts as that, but for the protection of the writ he would be liable in trespass therefor. Rorer on Judicial Sales, section 1003, and cases cited. *Quackenbush v. Henry*, (Mich.) 9 Rep., p. 120; *Allen v. McCalla*, 25 Iowa, 464, and authorities cited. "The levy must be so made that it identifies or gives the means of identifying what is levied on, so that any property levied on cannot be subsequently claimed. It must be seized manually or by assertion of control that may be made effectual, if necessary, and thus to bring and keep it within the dominion of the law for sale on execution, if needed, and for no other purpose." *Quackenbush v. Henry*, 9 Rep. 120. "A mere paper levy is void. The officer should take actual possession, but removal of the goods is not absolutely necessary; yet there must be actual control and view of the property with power of removal." Rorer on Judicial Sales, section 1002. See also section 1005, and *Haggerty v. Wilber*, 16 Johns. 287.

While the patterns remained locked in the building and the key continued in the possession of the owner, they were not subject to the actual control of the officer, nor had he the power of removal. It is true the officer had the physical power to break open the building and assume control of the property. But in doing so he would of necessity materially change his situation respecting the property. Control and power of removal is a very different thing from the ability to assume control and the power of removal.

If the officer had been a mile away from the property, it could not be said that the property was under his control and subject to his power of removal, and yet he would have possessed the same physical power of putting himself in a condition to assume actual control and the power of removal as in the present case.

We feel that to hold a valid levy upon personal property may be made, as was attempted in this case, would be adopting too loose a rule. We are asked to render such judgment here, upon the facts found, as the court below should have done. The amount due upon the chattel mortgage is not found, and hence we have no data for the rendition of final judgment. The cause must be remanded to the court below.

*Reversed.*

NOTE. — See, accord, *Meyer v. Missouri Glass Company*, 65 Ark. 286; *Taffts v. Manlove*, 14 Cal. 47.

In *Lane v. Jackson*, 5 Mass. 157, the facts were as follows: A ship arrived at Boston, having on board goods, packed in a trunk, consigned to A. The defendant, a deputy sheriff, went on board the ship, and demanded the goods from the mate, who answered that they were below and could not be got at, as the hatches had not been opened. The defendant directed the mate in writing to take posses-

sion for him of all the goods A had on board, as soon as they could be come at, and the mate agreed to do so. The court was of opinion that these acts, without more, did not constitute an attachment.

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EVANS v. HIGDON.

1 Baxter (Tenn.), 245. 1872.

McFARLAND, Judge, delivered the opinion of the court.

This is an action of replevin by Higdon, to recover a mule, upon the following facts: The mule belonged to Clements, who had been renting a farm from Colonel Gordon. He absconded, leaving the mule upon Gordon's farm. Rankin and others sued out an attachment from a Justice of the Peace. Higdon was deputed to execute the process. He went in company with Rankin to Colonel Gordon's farm. They inquired of Mrs. Gordon if Clement had a mule there; she told them he did — that it was in the barn. The witnesses differ as to the details, but agree in substance. The mule was described to them by Mrs. Gordon, so they could distinguish it from other mules of Colonel Gordon's, that were in the barn. The barn was locked, and the key at the time in the possession of a black boy hired at the place, and under the control of Mrs. Gordon, her husband being sick at the time. Mrs. Gordon proposed to get the key for Higdon and Rankin, but they decided it was not necessary. They went to the barn, some two hundred yards off; they could see through the cracks, and picked out the mule from the others, and in the language of the witness, made the levy. But whether the endorsement was made on the attachment then, or when they returned to the village of Lynnville, is not certain. The stable-door was not unlocked, and they did not take actual possession of the mule. They informed Mrs. Gordon of what they had done, and requested her to keep the mule for Higdon, which she agreed to do. They then left, and in a few minutes another special deputy came with another attachment against Clement — levied upon the mule, and took possession of it, getting the key from the boy Peter. They placed the mule in the possession of Evans. These are, in substance, the facts upon which Higdon's title is predicated. A levy by an officer which will vest the title of personal property in him, does not consist in writing out the levy on the process. He must take possession of the property either actually, or do something which amounts to the same thing. The Judge told the jury that manual possession was ordinarily necessary, but if the property at the time was in the power of the officer, so he could have taken possession of it, but was in the possession of a third party, who agreed to hold it for the officer, this would be sufficient. Assuming this to be correct, as an abstract proposition, we think the evidence

does not sustain the verdict. We do not understand that Mrs. Gordon was in possession of the mule; it was in her husband's barn, and she might have controlled the boy Peter, who had the keys at the time; but neither in law or in fact do we think she was in possession. The proposition of the Judge, as applied to these facts, must have misled the jury, and renders, we think, the proposition erroneous. Actual possession, or that which amounts to it is necessary to vest the property in the officer.

*Reverse the judgment.*

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ELLIOTT v. BOWMAN.

17 Mo. App. 693. 1885.

A DEPUTY sheriff levied upon a safe, declaring that he levied upon the safe and its contents. The safe was locked by means of a combination lock, the numbers of which were unknown to the sheriff, and he required the aid of an expert locksmith to open the safe. The owner refused to open the safe or disclose the combination. After the safe was seized, but before it was opened, the owner made an assignment for the benefit of creditors. The court said (p. 697):—

“Upon the first question the court is of opinion that the levy upon the safe and contents was an effectual levy upon the books of account within the safe from the time when the safe was actually seized by the sheriff. The authorities cited for the opposing view go merely to the extent of holding that, in order to make a valid levy upon personality, the goods must not only be within the view of the officer, but there must be an actual manucaption, together with such oral declarations or other proceedings as would fully apprise all persons interested of the extent of the levy. *Douglas v. Orr*, 58 Mo. 573; *Newman v. Hook*, 37 Mo. 207; *Yeldell v. Stemmons*, 15 Mo. 443; *Sams v. Armstrong*, 8 Mo. App. 573. This is in conformity with the definition of the word ‘levy’ as used in our statute relating to executions, which ‘shall be considered to mean the actual seizure of property by the officer charged with the execution of the writ.’ Rev. Stat. sect. 2357. In this case the sheriff, by an actual seizure which purported to be a seizure not only of the safe but of its contents, by demanding the combination of the defendant in the attachment suit, and by making immediate endeavors to get the safe open, not only placed the safe and its contents within his own power so as to exclude the power of all other persons, but by the most unequivocal assertion and conduct indicated that his seizure extended to the contents of the safe as well as to the safe itself. The mere fact that he did not know at the time of seizing the safe what its contents were does not exclude the conclusion that his levy was effective as a levy upon such



contents from the date of the seizure. The contrary conclusion would be no more absurd than to hold that where an officer levies upon a quantity of goods in bales or boxes, without knowing the nature of the goods, his levy is not effective until he has had time to break the packages and expose the separate pieces of goods contained in them to his view."

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### KEEPERS v. FIDELITY TITLE AND DEPOSIT CO.

56 N. J. L. 302. 1893.

ON error to the Supreme Court.

The plaintiff, Lillie A. Keepers, brought two suits in the Supreme Court against the Fidelity Title and Deposit Company, one an action on contract, to recover \$418.22, the balance of \$970, which had been deposited in the Howard Savings Institution by and in the name of Minnie I. Munn, and the other an action of replevin, to obtain possession of stock certificate No. 2459, for forty-one shares of the capital stock of the American Insurance Company, a bond made by the plaintiff to Minnie I. Munn for \$1000, and a bond made by John Bernreuther to James T. VanNess for \$400, which had been assigned to Minnie I. Munn.

On the trial of these suits in the Essex Circuit, it appeared that all the things in controversy had belonged to the plaintiff's sister, Minnie I. Munn, and the plaintiff testified that her sister, while upon her deathbed at home, a few hours before she lapsed into final unconsciousness, sent for the plaintiff, who lived elsewhere, and on the plaintiff's coming into the room the following incidents took place: "My sister turned to my mother and said 'To get those things for her'; my mother asked, 'What things?' and she replied, 'My things in the bureau'; my mother then brought to her from the bureau drawer a handkerchief containing some things, and then she asked my mother to leave the room, which she did; my sister then opened the handkerchief, and it contained some jewelry and a little bag; from the bag she took a tiny key and said to me, 'You see that key'; I said, 'Yes'; and she handed it to me and said, 'There, that key I have carried in my bosom until it is rusty; it is the key of the box, and that I give to you and all it contains'; then she took the handkerchief, with the jewelry in it, and held the four corners of it up and passed it over to me, saying, 'There, I give you these; I have no more use for them.'" It further appeared that at that time the box which this key fitted was in another room of the same house, locked in a closet of which Miss Munn's mother had the key, and that the box contained the savings bank book showing Miss Munn's deposit in the Howard Savings Institution, the stock certificate and the two

bonds, besides many other papers, some of which did not belong to Miss Munn. During Miss Munn's life the plaintiff did not ask her mother for the key of the closet or make any attempt to assume control over or take possession of the box or its contents, nor did the box and contents ever come into her possession, but they were taken by the defendant company as the administrator of Miss Munn.

On these facts the trial justice ruled that there was not such a delivery of the things in controversy as was necessary to make a valid *donatio mortis causa*.

DIXON, J. The first question for solution is whether the delivery of the key of a box containing valuable papers is sufficient delivery to constitute a valid *donatio mortis causa* of the papers, when the box is not in the presence or immediate control of the donor and does not pass into the actual possession of the donee during the lifetime of the donor.

The leading case on the subject of donations *mortis causa* is *Ward v. Turner*, 2 Ves. Sr. 431 (A.D. 1752), where Lord Chancellor Hardwicke laid down the rule, with reference to delivery, which has ever since formed the basis whereon such gifts are supported. After showing that the recognition of donations *mortis causa* by the common law was derived from the civil law, he declared that the civil law had been "received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls tradition"; that "tradition or delivery is necessary to make a good donation *mortis causa*." He further said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of a symbol is sufficient; but I cannot agree to that, nor do I find any authority for that in the civil law, which required delivery in some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing. . . . Yet," he added, "notwithstanding, delivery of the key of bulky goods, where wines, etc., are [concerned], has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing."

Although this doctrine has received general approval in the courts of England and of this country, yet some divergence has taken place respecting the facts which may constitute the delivery required. For the purpose of giving effect to the difference mentioned by Lord HARDWICKE between articles that were bulky and those that were not, it was usually stated in the earlier cases that the delivery must be according to the nature of the thing given, such as the thing was reasonably capable of, while in later cases, as if ignoring the ground of the distinction, it has often been asserted that the situation as well as the nature of the thing must be taken into consideration, and only

such delivery was requisite as, under all the circumstances, the donor could conveniently make. On this footing, it has in some instances been adjudged that delivery of the key was sufficient delivery for a valid donation *mortis causa* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor, and not otherwise transferred to the possession of the donee. *Cooper v. Burr*, 45 Barb. 9; *Marsh v. Fuller*, 18 N.H. 360; *Jones v. Brown*, 34 Id. 439; *Thomas v. Lewis*, 89 Va. 1; *Phipard v. Phipard*, 8 N.Y. Sup. 728; *Pink v. Church*, 14 Id. 337.

That in this respect these cases depart from the view intended to be expressed in the leading case is, I think, manifest by noticing Lord HARDWICKE's comment on *Jones v. Selby*, Prec. Ch. 289, and his ruling in *Smith v. Smith*, 2 Str. 955.

In *Jones v. Selby* the donor had called his cousin, who was his housekeeper, and two of his servants, and said: "I give to my cousin, Mrs. Wetherley, *this* hair trunk and all that is contained in it," and delivered her the key thereof; and, on the strength of this, Mrs. Wetherley claimed a £500 tally as part of the contents of the trunk. This claim was allowed by the Master of the Rolls as a valid *donatio mortis causa*, and would have been allowed by Lord Chancellor COWPER on appeal, except for lack of full proof that the tally was in the trunk at the time, and his conclusion that the gift was satisfied by a legacy to the donee given in a will subsequently made by the donor. On this, Lord HARDWICKE's comment was: "The only case wherein such a symbol seems to have been held good is *Jones v. Selby*, but I am of opinion that amounted to the same thing as delivery of the possession of the tally, provided it was in the trunk at the time." He thus seems to state that, with regard to the tally, the key was but a symbol, the delivery of which he had just declared to be insufficient, but that the circumstances showed a delivery of the trunk, and consequently of the tally if in the trunk.

*Smith v. Smith*, 2 Str. 955, was a ruling at *Nisi Prius*, where the plaintiff's intestate, having lodgings in the defendant's house, had brought there furniture and plate, and had said that whatever he brought into those lodgings he did not intend to take away, but gave directly to defendant's wife. Whenever he went out of town, he used to leave the key of his lodgings with the defendant. He having died, probably out of town (*Bunn v. Markham*, 7 Taunt. 224), Lord HARDWICKE, then Chief Justice, permitted the jury to find a valid gift. This ruling accords with the view expressed in the leading case, upon the idea that the things given were too bulky for actual delivery, otherwise than by leaving them in the defendant's house and giving him the key of the rooms.

The same distinction is clearly noted in *Hatch v. Atkinson*, 56 Me. 324, and other cases.

The opinion that delivery of a key is equivalent to the delivery of

documents locked up under the key, is not at all supported by the views announced in such cases as *Hawkins v. Blewitt*, 2 Esp. 663; *Bunn v. Markham*, 7 Taunt. 224, and *Warriner v. Rogers*, L. R., 16 Eq. 340, where the retention of the key by the donor was deemed to negative the claim of a gift, for, to constitute a gift, there must be, besides delivery of the thing, an intention to transfer to the donee complete dominion over it, and the withholding of the key proved that no such intention existed, notwithstanding the fact of delivery.

Nor is that opinion, in its general form, fully sustained by cases like *Debinson v. Emmons*, 158 Mass. 592, where the receptacle was in the immediate presence and control of the parties, in a room occupied by the donee as well as the donor, and where the only external sign of the exclusive possession of the receptacle was the actual possession of the key. Under such circumstances, tradition of the key might be considered tantamount to tradition of the receptacle and its contents, without giving the same force to the tradition of the key, when the receptacle was away from the presence of the parties and in the actual possession of a third person.

We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridden v. Thrall*, 125 N.Y. 572, that "public policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged." When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means of them; that millions of dollars' worth of property are locked up in vaults the keys of which are carried in the owners' pockets, and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault, the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury. Around this mode the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily-proven devices.

We think the trial justice properly decided that the evidence would not warrant the jury in finding such a delivery as is essential to a donation *mortis causa*.

NOTE. — In *Coleman v. Parker*, 114 Mass. 30, the court said: "We have no doubt that a trunk with its contents might be effectively given and delivered, in such a case, by a delivery of the key, not as a symbolical delivery of the property, but because it is the means of obtaining possession."

In *Cooper v. Burr*, 45 Barb. (N.Y.) 9, 33, the court said: "It is essential to a valid gift by parol, that there should be an actual or symbolical delivery. The title does not pass unless possession, or the means of obtaining it, are conferred by the donor and accepted by the donee."

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CALKINS v. LOCKWOOD.

17 Conn. 154. 1845.

CHURCH, J. It is claimed, that the pretended sale to the plaintiffs by Payne was void, as falling within the provisions of the 2d section of our statute of frauds and perjuries<sup>1</sup> — that they did not accept and actually receive any part of the iron, nor give anything in earnest, etc. What are the facts? The iron sold consisted of a large quantity, ninety-three tons, and was lying by itself, and separate from all other iron. The parties met at the place where the iron was, and concluded the terms of the sale, by agreeing upon the price and its application upon the debts due to the plaintiffs; and then Payne and the plaintiffs, as the motion finds, stepped up to the iron, and Payne, the vendor, said to the plaintiffs, the vendees, "I deliver this iron to you at that price," etc.; and then Lockwood came up, and claimed the iron, which he afterwards removed, and for which conversion the present action was instituted. There was here nothing remaining to be done, by the vendor, to consummate the sale or delivery. He had no further claim upon the iron. The ponderous nature of the commodity rendered the removal of it, at that time, impossible. And why should it have been moved? The vendees were there, upon the ground; and went up to receive the iron, when it was delivered by the vendor. The delivery was not symbolical, but actual; and it was received by the vendees at the hands of the vendor, with the intent to take and hold the possession of it.

NOTE. — See, however, *Shindler v. Houston*, 1 N.Y. 261. The plaintiff was the owner of lumber which was piled on the dock apart from any other lumber. The plaintiff and defendant met at the place where the lumber lay. The plaintiff asked the defendant how much he would give. The defendant named the amount he would give. The plaintiff then said, "The lumber is yours." The majority of the court was of the opinion that there had been no receipt of the lumber by the defendant within the meaning of the Statute of Frauds.

<sup>1</sup> This section reads as follows: "That no contract for the sale of any goods, wares, and merchandise, for the price of thirty-five dollars or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest, to bind the bargain, or in part of payment, or some note or memorandum, in writing, of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

*B. The Intent to Control.*

## CARTWRIGHT v. GREEN.

8 Ves. 405. 1803.

THE bill stated, that Ann Cartwright died possessed of a bureau, in a secret part of which she had concealed nine hundred guineas in specie. After her death Richard Cartwright, her personal representative, lent the bureau to his brother Henry, who took it to the East Indies, and brought it back, the contents remaining still undiscovered. It was then sold to . . . Dick for three guineas, who delivered it to the defendant Green, a carpenter, for the purpose of repairing it. Green employed a person, named Hillingworth, who found out the money, and received a guinea for his trouble; and the whole sum of nine hundred guineas was possessed by the three defendants Green, his wife, and Elizabeth Sharpe, who secreted and converted it to their own use.

This bill, charging all these circumstances, and that Green paid his debts, and bought stock, for which he had no other means except the money found in the bureau, prayed a discovery; stating, that the plaintiff Cartwright had brought an action as personal representative of Ann Cartwright. Dick joined in the bill as a plaintiff; but he did not set up any claim to the money on his own account.

THE LORD CHANCELLOR (ELDON). Finally the question in this case will be, whether the bill charges a felony or not. To the objection, that the demurrer covers too much, the answer is, that the bill is in aid of an action; and if it appears upon the bill, that the action is founded in a felony, the policy of the law requires that the court should not give the discovery. As to the ground, that the wife being present with her husband could not be punished, and therefore the demurrer is bad, because all three joined, the answer is, that all the three may now join *ore tenus* in another ground of demurrer, which would be good, namely, that the discovery is in aid of an action; which, if founded in felony, the court cannot aid. The question therefore is reduced to this, whether the facts stated amount to felony or larceny: upon which the distinctions are so extremely nice and depend upon attention to so many cases, and are so important in the consequences, that I will not trust myself to say anything upon them, until I have seen all the cases, and consulted several of the judges.

April 28th. THE LORD CHANCELLOR (ELDON). This case involves a very delicate consideration in equity; for, whatever was the old doctrine as to larceny, distinctions have been taken in late cases,

which make it frequently the subject of very nice consideration, whether the taking is a trespass or only a breach of trust. I have looked into the books; and have talked with some of the judges and others; and I have not found in any one person a doubt, that this is a felony. To constitute felony there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in Hawkins there is no doubt, this bureau being delivered to the defendant for no other purpose than repair, if he broke open any part, which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find, that is a felonious taking within the principle of all the modern cases; as not being warranted by the purpose, for which it was delivered. If a pocket-book containing bank-notes was left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket and the notes out of the pocket-book, there is not the least doubt that is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being intrusted with it for the purpose of opening it; and that is a felony according to the modern cases. There is a vast number of other cases. Those, with whom I have conversed upon this point, who are of very high authority, have no doubt upon it.

NOTE. — In *Merry v. Green*, 7 M. and W. 623, A bought a bureau at auction, and thereafter discovered, in a secret drawer, a purse containing money, and appropriated it to his own use. At the time of the sale no person knew that the bureau contained anything whatever. The court was of opinion that A was guilty of larceny, if, at the time of his purchase, he had no reason to believe that anything more than the bureau itself was sold to him.

*Rex v. Mucklow*, 1 Moody, C. C. 160. A letter was delivered to the prisoner which was not, in fact, intended for him. He appropriated the property which it contained. The court was of opinion that a conviction of larceny was wrong, as "it did not appear that the prisoner had any *animo furandi* when he first received the letter."

On the question of what constitutes "taking possession," under the law of larceny, the student should note the well-established doctrine that a bailee who breaks bulk may be convicted. See Roscoe's Digest (1835), 479, where the learned author says: "Upon the principle that it is not felony in a bailee to convert to his own use the goods bailed to him, a nice distinction has been grafted, which seems, says Mr. East, to stand more upon positive law, which cannot now be questioned, than upon sound reasoning. . . . The distinction is thus stated by Lord Hale. If a man delivers goods to a carrier to carry to Dover, and he carries them away, it is no felony;

but if the carrier have a bale or trunk with goods in it delivered to him, and he breaks the bale or trunk, and carries away the goods *animo furandi* . . . it is a felonious taking."

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REGINA v. RILEY.

Dearsly's C. C. 149. 1853.

At the General Quarter Sessions of the Peace for the County of Durham, held at the City of Durham before Rowland Burdon, Esquire, chairman, on the 18th day of October, 1852, the prisoner was indicted for having on the 5th of October, 1852, stolen a lamb the property of John Burnside.

The prisoner pleaded not guilty.

On the trial it was proved that on Friday, the 1st day of October, 1852, John Burnside, the prosecutor, put ten white-faced lambs into a field in the occupation of John Clarke, situated near to the Town of Darlington. On Monday, the 4th day of October, the prisoner went with a flock of twenty-nine black-faced lambs to John Clarke, and asked if he might put them into Clarke's field for a night's keep, and upon Clarke's agreeing to allow him to do so for one penny per head, the prisoner put his twenty-nine lambs into the same field with the prosecutor's lambs.

At half past seven o'clock in the morning of Tuesday, the 5th day of October, the prosecutor went to Clarke's field, and in counting his lambs he missed one, and the prisoner's lambs were gone from the field also. Between eight and nine o'clock in the morning of the same day, the prisoner came to the farm of John Calvert, at Middleton Saint George, six miles east from Darlington, and asked him to buy twenty-nine lambs. Calvert agreed to do so and to give eight shillings apiece for them. Calvert then proceeded to count the lambs, and informed the prisoner that there were thirty instead of twenty-nine in the flock, and pointed out to him a white-faced lamb, upon which the prisoner said if you object to take thirty, I will draw one. Calvert, however, bought the whole of them, and paid the prisoner twelve pounds for them.

One of the lambs sold to Calvert was identified by the prosecutor as his property, and as the lamb missed by him from Clarke's field. It was a half-bred white-faced lamb, marked with the letter T, and similar to the other nine of the prosecutor's lambs.

The twenty-nine lambs belonging to the prisoner were black-faced lambs. On the 5th of October, in the afternoon, the prisoner stated to two of the witnesses that he never had put his lambs into Clarke's field, and had sold them on the previous afternoon for eleven pounds twelve shillings, to a person on the Barnardcastle Road, which road leads west from Darlington.



There was evidence in the case to show that the prisoner must have taken the lambs from Clarke's field early in the morning, which was thick and rainy.

It was argued by the counsel for the prisoner, in his address to the jury, that the facts showed that the original taking from Clarke's field was by mistake, and if the jury were of that opinion, then as the original taking was not done *animo furandi* the subsequent appropriation would not make it a larceny, and the prisoner must be acquitted. The Chairman, in summing up, told the jury that though they might be of opinion that the prisoner did not know that the lamb was in his flock until it was pointed out to him by Calvert, he should rule that in point of law the taking occurred when it was so pointed to the prisoner and sold by him to Calvert, and not at the time of leaving the field.

The jury returned the following verdict: "The jury say that at the time of leaving the field the prisoner did not know that the lamb was in his flock, and that he was guilty of felony at the time it was pointed out to him."

The prisoner was then sentenced to six months' hard labor in the house of correction at Durham, and being unable to find bail was thereupon committed to prison until the opinion of this court could be taken upon the question:—

Whether Charles Riley was properly convicted of larceny.

The case was argued before POLLOCK, C. B., PARKE, B., and WILLIAMS, J., TALFOURD, J., and CROMPTON, J.

*Liddell* (for the prisoner). Here the prisoner had the lamb in his possession before the time of the alleged taking.

POLLOCK, C. B. What do you mean by the word "possession"?

*Liddell*. He had such a possession as would have enabled him to maintain trespass.

POLLOCK, C. B. The difficulty in the case is, when can it be said that there was a taking?

*Liddell*. If not when the flock left the field, when was the taking?

POLLOCK, C. B. We are all of opinion that the conviction in this case is right. The distinction between this and the case of *Reg. v. Thistle*, 1 Den. C. C. 502, is this: If a man rightfully gets possession of an article without any intention at the time of stealing it, and afterwards misappropriates it, the law holds it not to be a felony. In that case a man had delivered his watch to a watchmaker to regulate it, and the watchmaker afterwards disposed of it for his own use. In the case of *Thurborn v. Thistle*, 1 Den. C. C. 388, where PARKE, B., delivered the considered judgment of the judges, it was ruled that "if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is no larceny; but if

he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny." It may reasonably be said not to be a violation of any social duty for a man who finds a lost article to take it home for the purpose of finding out the true owner; and if he does this honestly in the first instance, and afterwards, though he may have discovered the true owner, is seduced into appropriating it to his own use, he is not guilty of larceny, though he does wrong. So in *Leigh's case*, 2 East, P. C. 694, it appeared that the prosecutor's house was on fire, and that the prisoner assisted in saving some of his goods, and took some of them home to her lodgings, but next morning denied that she had them in her possession. It was suggested that she originally took the goods with an honest intent, that of assisting in saving her neighbor's property from the fire. She was found guilty; but the judges, as it appeared that she originally took the goods merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention till afterwards, held that the conviction was wrong. There the original taking was not wrongful; indeed it was right, for she took possession of the goods under the authority of the true owner. In all these cases the original possession was not wrongful. But in the case now before the court, the prisoner's possession of the lamb was from the beginning wrongful. Here the taking of the lamb from the field was a trespass; or if it be said that there was no taking at that time, then the moment he finds the lamb he appropriates it to his own use. The distinction between the cases is this: if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattel, *animo furandi*, it is larceny.

PARKE, B. The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along, just as at common law, a trespass begun in one county continued in another, and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass; but as soon as he entertains a felonious intent, that becomes a *felonious trespass*. *Leigh's case* was altogether a different case from the present. There the original possession was lawful, with the assent of the true owner, the prisoner rendering charitable assistance in preserving the goods from fire. When she first took the goods into her possession, she was not a trespasser.

WILLIAMS, J., TALFOURD, J., and CROMPTON, J., concurred.

## QUEEN v. ASHWELL.

L. R. 16 Q. B. D. 190. 1885.

CASE stated by DENMAN, J.

At the assizes for the County of Leicester in January, 1883, Thomas Ashwell was tried for larceny of a sovereign, the moneys of Edward Keogh.

Keogh and Ashwell met in a public-house on the evening of the 9th of January. At about 8 P.M., Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that he would then repay him. Keogh consented, and putting his hand in his pocket pulled out what he believed to be a shilling, but what was in fact a sovereign, and handed it to Ashwell, and went home leaving Ashwell in the yard. About 9 the same evening, Ashwell obtained change for the sovereign at another public-house.

At 5.20 the next morning, Keogh went to Ashwell's house and told him that he had discovered the mistake, whereupon Ashwell falsely denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public-house on the night before. But he afterwards said, "I had the sovereign and spent half of it, and I shan't give it him back because I only asked him to lend me a shilling."

It was submitted for the prisoner that there was no evidence of larceny — no taking — no obtaining by trick or false pretence — no evidence that the prisoner at the time he received the sovereign knew it was not a shilling.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the Court of Criminal Appeal.

The jury found that the prisoner did not know that it was a sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner having, soon after he received it, discovered that it was a sovereign could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use, and denied the receipt of it, knowing that the prosecutor had not intended to part with the possession of a sovereign but only of a shilling. They added that if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty, they meant to do so.

A verdict of guilty was entered, but the prisoner was admitted to bail, to come up for judgment at the next assizes if this court should

think that upon the above facts and findings he could properly be found guilty of larceny.

SMITH, J., read the following judgment. The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh.

The material facts are as follows: Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Some time afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and he then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute?

To constitute the crime of larceny at common law, in my judgment there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In Hawkins's Pleas of the Crown, book 1, chap. 33, sect. 1, it is stated: "It is to be observed that all felony includes trespass; and that every indictment of larceny must have the words *felonice cepit* as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." As I understand the counsel for the Crown did not really dispute the above definition, and indeed if he had, upon further referring to the 3d Institutes, chap. 47, p. 107, and 1 Hale's Pleas of the Crown, p. 61, it would be found to be fully borne out by those writers. The two cases cited in argument, *Rex v. Mucklow* and *Reg. v. Davies*, are good illustrations of what I have enunciated; and if other cases were wanted, there are plenty in the books to the same effect.

In the present case it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to shew that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this in my judgment is also fatal to the act being larceny at common law.

As to this last point, the law laid down by COCKBURN, C. J., BLACKBURN, MELLOR, LUSH, GROVE, DENMAN, and ARCHIBALD, JJ., in the case of *Reg. v. Middleton*, is very pertinent; it is as follows: "We admit that the case is undistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mis-

take for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not, would depend upon this, whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." I believe the above to be good law. The contention, however, of the Crown was that, although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is, that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The proper direction to be given to a jury being, as I understand, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned." See *Reg. v. Thurborn* and *Reg. v. Glyde*. If he did, he would be guilty of larceny, aliter he would not. Then it was argued by the counsel for the Crown, that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support him.

Keogh, in the present case, intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*d.* instead of 12*d.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that shew that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely the coin) in this case never was lost; then how could it be found? In my judgment the argument upon this point for the Crown is wholly fallacious and fails. It was further argued for the Crown that the present case was covered by authority, and the cases of *Cartwright v. Green* and *Merry v. Green* were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the Crown. In the first of these cases, the question arose upon demurrer of a bill in chancery as to whether a felony was disclosed upon the face of the bill. Lord ELDON, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it which it was not necessary to touch for the purpose of repair with the intention of taking and appropriating

to his own use whatever he should find therein, that this was larceny. I conceive this to be distinctly within the principle I have above stated — there was the taking against the will of the owner with the felonious intent at the time of taking.

The other case, namely, *Merry v. Green*, which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Baron PARKE, who delivered the judgment of the court, upon the principles applicable to a case of finding. The learned Baron says: "It seems to us, that though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies to this." I understand the learned Baron when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel, for there are no cases extant as to finding out a mistake to which his remark could apply. That, too, is the distinction between the present case and that before Baron PARKE. No intention to deliver the chattel (namely, the purse and money) at all ever existed, whereas in the present case there was every intention to deliver the chattel (namely the coin), and it was delivered and honestly received.

In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner, cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offence.

Lord COLERIDGE, C. J., read the following judgment.

On the question as to larceny at common law, I desire to add only a few words, and to call attention to a case to which my attention has been called by a gentleman at the bar, which was not mentioned in the argument; possibly because it was one which did not exactly suit the views of either party to that argument. I assume it to be now established law that where there has been no trespass, there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery — in the sense in which I will explain in a moment — of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute, with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, unless the giver and receiver intend to give and to receive respectively what is respectively given and received.

It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose, if I say that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not, that a man did in law what he did not know he was doing and did not intend to do — to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my brother STEPHEN that fictions are objectionable, and I desire not to add to them; but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence. If it had been so decided by authority which binds me, of course I should submit; but if it has not been so decided, I take the freedom to say it is not law — at least yet. In this case, therefore, it seems to me there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered.

Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny. I think for the reasons I have given, and in the sense I have defined, the prisoner did so here: and this seems to me, with great deference to my brother SMITH, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time.

This would be my view if the case were bare of authority, and the matter were *res integra*. But it is not *res integra*, and there is abundant authority. On this part of the case I concur with my brother CAVE. I think we cannot reverse this conviction without practically overruling Lord ELDON in *Cartwright v. Green*, the Court of Exchequer in *Merry v. Green*, and the dicta cited by my brother CAVE from the judgment of the majority of the judges in *Reg. v. Middleton*. I can see no sensible or intelligible distinction between the delivery of

a bureau not known to contain a sum of money or a purse and the delivery of a piece of metal not known to contain in it 20s. . . .

It remains only for me to call attention to *Reg. v. Riley*, the case which I mentioned at the beginning of my judgment. In that case a man had without intending it, and innocently, driven off a lamb belonging to another man with a flock belonging to himself. Some time afterwards he discovered the mistake, and sold his own flock and the lamb that was not his own to a purchaser. It was held that he was guilty of larceny of the lamb. The case was tried in 1852, when the law of the replication *de injuria* decided in *Crogate's case*, and the distinction between case and trespass decided in *Scott v. Shepherd*, still commanded the assent, indeed the veneration, of Westminster Hall. And the ground on which the conviction was supported was that there had been a trespass in driving off the lamb, however innocently, that by the sale the trespass became felonious and I suppose felonious *ab initio*, to bring it within the definitions given in *Reg. v. Thurborn*. The court there upheld the conviction on a ground extremely technical. If the owner of the lamb had been present when it was driven off, and believed it to be one of the prisoner's flock, according to the present argument the conviction in *Reg. v. Riley* must have been quashed. I cannot think it would have made any difference, and the case as it stands is an authority under circumstances hardly different from those in the present case for upholding this conviction. I am therefore of opinion that the conviction was right.

. . . There are seven [judges] for affirming the conviction and seven for quashing the conviction, and by the well-known rule of this court, *præsumitur pro negante*, the conviction stands.

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### FORD v. STATE.

85 Md. 465. 1897.

THE appellant was indicted for violating the lottery laws. Section 178 of chapter 310 of the Laws of 1894 provided that "if any person shall have in his possession in this State any book, list, slip or record of the numbers drawn in any lottery, whether in this State or elsewhere, or any book, list, slip or record of any lottery ticket or anything in the nature thereof, mentioned in this section, or of any money received or to be received from or for the sale of any such lottery ticket, or thing in the nature thereof as aforesaid, (he) shall be liable to indictment and upon conviction shall be, in the discretion of the court, fined any sum not exceeding one thousand dollars, or shall be imprisoned for a period not exceeding one year, or shall be both fined and imprisoned; provided, however, that this section shall not



apply to any person who may have possession of any of the articles herein mentioned for the purpose of procuring or furnishing evidence of violations of any of the provisions of the laws relating to lotteries."

BOYD, J., delivered the opinion of the court.

In view of the disastrous effect of those dealing with lottery tickets, and upon the community where such business is conducted, there can be no doubt about the right of the Legislature to prohibit any one from having them in his possession, if that be reasonably necessary for the suppression of the evil. As the statute made it a crime to have them in possession, the purpose for which the traverser had them is wholly immaterial, and, inasmuch as the Legislature did not make the crime dependent upon the knowledge of the party as to what the articles were, it was unnecessary to allege in the indictment that the traverser had them in his possession knowingly, wilfully or in any other words that would impute knowledge of the fact that they were some of the articles prohibited by the law. The allegations in the indictment were clearly sufficient.

But it is contended that if that be conceded, the effect of the statute was simply to shift the burden to the traverser and he could still prove that he did not have knowledge of what the articles were, and hence was not guilty of a violation of law, and that if the statute must be so construed as to deprive him of that right, then it is in conflict with the Constitutions of the United States and of this State. This question was intended to be raised by the special plea filed and the offer of testimony stated in the bill of exceptions. The plea alleges that the defendant "was in possession of policy books and slips, as stated in said indictment, but also says that he is in no way engaged in the policy business and that he was not aware that the papers, books and other articles which were found in his possession were policy or lottery slips; that the said articles were given to him to carry to a certain place, and that he was then taking them to that place without knowing what said articles were." The proffer of evidence, as stated in the bill of exceptions, was "that said articles were given to him by a man who asked him to deliver them to another man; and that he did not know what said articles were and had no knowledge that they were policy books or anything connected with said business."

It would, of course, be no excuse if the traverser did not know that the law prohibited the possession of these articles. He is, on the contrary, presumed to know that it did. Would, then, his ignorance of the fact that what he had in his possession were policy books and slips excuse him? It is argued that to hold it would not, might result in the conviction and punishment of innocent people — that some one might find on the street a book or list of lottery tickets and not know what it was, but be convicted simply because he had it in his

possession. We are not informed by the record how the books, lists, slips and records named in the indictment are made and what they embrace, but in the supplemental brief the learned counsel for the traverser have undertaken to explain them, and we cannot imagine how any one finding either of them on the street would be induced to take it into his possession unless he knew what it was, for it seems to be merely a collection of figures and letters so arranged as to be utterly unintelligible to any one not learned in the business and to an innocent person would certainly not be suggestive of any value. If any one be so unfortunate as to find one, and whilst satisfying his curiosity as to what it is a police officer overtakes him, it will be time enough to determine whether he had it in his possession within the meaning of the statute. But if after a person has undoubtedly gotten into his possession one of the prohibited articles he is to be permitted, notwithstanding the language of the statute, to prove that he found it, or did not know what it was, it will make the statute practically useless; for if he swears that such be the case it will generally be impossible for the State to prove the contrary, and will be a great temptation to perjury, not only to the accused, but to others who might come to his assistance.

In *State v. Baltimore and Susquehanna Steam Company*, 13 Md. 181, the statute under consideration provided "that it shall not be lawful for any slave to be transported on any railroad, or on any steamboat, etc., without a permission in writing from the owner of such slave." The defence was that the company, or its agents, had no knowledge that the negro was on board and had no intention to violate the law, but the court held that the liability could be enforced without reference to such circumstances. TUCK, J., in delivering the opinion of the court, said, "If the Legislature deemed it expedient in view of the grievance complained of to hold persons responsible for transporting negroes, whether they were instigated by a criminal intent or not, they had the power to do so. Such acts may produce mischief in individual cases, but the inconvenience and injury would be much more general if in every case of this kind the party charged could defend himself by offering evidence that he did not know the negro was on board the boat, and that reasonable diligence had been used to prevent such persons from coming on board. The law would scarcely afford any protection to slave owners." In *Carroll v. State*, 63 Md. 551, this court said, "As ignorance of the existence of such law will not excuse, so also ignorance of a fact necessary to be known to avoid a violation of law will not excuse." In that case there are quotations from 3 Greenleaf on Evidence, section 21, that "where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation." Again, "Such is

the case in regard to fiscal and police regulations, for the violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law, in those cases, seems to bind the party to know the facts and to obey the law at his peril." The court refers to a note in Greenleaf where the rule "is said to apply to the sale of any articles, the sale of which is prohibited, and it has been held to be no excuse that the vendor did not know it was a prohibited article." Some of the cases cited in that opinion are very applicable to this case.

NOTE. — *Stevens v. State*, 19 Neb. 647. The defendant feloniously took a coat which contained a watch. The trial court refused to give the following instructions: —

"The defendant is charged with robbing one Oliver Scott of one overcoat and one watch. If you find from the evidence that at the time of the taking of said coat the watch was in the pocket of the coat, and that the defendant did not know it was there, but afterwards found it there, then he could not be charged with the intent to rob him of the watch, and the fact that the watch was afterwards found on the person of the defendant and in his possession, is not sufficient to warrant you in finding him guilty of the robbery of the watch."

The appellate court said: "It will not be seriously contended that the above instruction states the law correctly. The party took the coat which contained a watch, and appropriated all the property to his own use. There was but one act, and the party committing it is liable for all the property taken by him. The instruction was therefore properly refused."

*United States v. Lee*, 4 Cranch, C. C. 446. If a person feloniously takes a pocketbook containing valuable contents, and is convicted of stealing the pocketbook, he may not thereafter be convicted of stealing the contents.

In 3 Greenleaf on Evidence, § 21, the learned author says: "Where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owners and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance."

## SECTION 2.

## TAKING POSSESSION OF LAND.

## BRUMAGIM v. BRADSHAW.

39 California, 24. 1870.

THIS action was originally brought by Robert Dyson. He died, pending the action, and Brumagim was duly substituted as plaintiff in his stead.

The plaintiff alleged that Dyson had been in possession of a certain tract of land called the Potrero, and that the defendants had unlawfully entered upon that land.

CROCKETT, J. At the instance of the plaintiff, the court gave twelve instructions to the jury, the second of which is in the following words: —

"If the jury are satisfied from the evidence given in this cause, that George Treat entered upon and inclosed the Potrero in the year 1850, and are further satisfied that he then made a complete inclosure of the same, and that such inclosure was sufficient to turn and protect stock, and that he actually used such inclosure for that purpose up to the time of the alleged conveyance to Dyson, and that he deeded the same to Dyson, and that the land was used by Dyson subsequent thereto, for the purpose of pasturage, and that the land was suitable for pasturage; and that the defendants, or either of them who have answered, or those under whom they claim, entered adversely and subsequent to the completion of said inclosure, and while the said land was being so used by said Treat prior, and, by said Dyson, after said conveyance, you will find for the plaintiff against such defendant, or defendants, provided such defendant, or defendants, was occupying the premises at the time of the commencement of this suit."

This instruction is objected to by the defendants as wholly unauthorized by the testimony, and calculated to mislead the jury.

There is no contrariety in the evidence as to the natural features of the Potrero, nor as to the acts performed by Treat or Dyson, which, it is claimed, amounted, in law, to an inclosure and to the actual possession of the land. The testimony shows the Potrero to be a peninsula, containing about one thousand acres; bounded on the north by Mission creek and bay, on the east by the bay of San Francisco, on the south by the same bay and Precita creek, and on the west by a stone wall and ditch, running from Mission creek

on the north to Precita creek on the south, across the neck of the peninsula. It further appears that the wall and ditch were ancient works, probably built by the priests of the adjoining Mission of Dolores at an early day; and that in 1850 they had become considerably dilapidated, so as no longer to prevent the ingress and egress of cattle; that John Treat, or George Treat, or the two jointly, in the summer or autumn of 1850, repaired the wall and ditch, so as that, thereafter, it was sufficient to turn cattle; that they erected a gate in the wall, through which admission was had to the Potrero, and a small corral, for herding cattle, inside the wall, together with a shanty, in which the gate-keeper resided; that, immediately after the wall was repaired and the gate erected, they commenced to receive horses for pasturage and used the Potrero for that purpose — having, at times, several hundred head of horses pasturing there for hire; that, whilst the land was being thus used, John Treat relinquished to George Treat all his interest in the premises, who thereafter continued to use the land for pasturage, as it had before been used, until February, 1852, when he conveyed, by deed, to Dyson, all his interest in the property; and thereafter Dyson used the land for pasturage up to the time when the defendants entered; that the wall and ditch, together with the creeks and bay, formed an inclosure sufficient to protect and turn cattle; that, in 1850, and for several years thereafter, the Potrero afforded grass suitable for pasturage.

This brings us to the consideration of what we deem to be the most important and difficult point in the case. We assume that the court, in the instruction on which we have been commenting, clearly intended to say to the jury — and that the jury so understood it — that if Treat repaired the wall and ditch, and if these, together with the creeks and waters of the bay, formed a sufficient inclosure to turn cattle, and if the land was suitable for pasturage, and was used by Treat and afterwards by Dyson for that purpose, up to the time of the entry by the defendants, without title, that, in that event, it resulted, as a conclusion of law, that there had been established in Dyson such a *possessio pedis* as entitled the plaintiff to recover. For the reasons already stated, we must assume that the facts referred to in the instruction were satisfactorily proved. But did the court draw a correct conclusion of law from these facts? Conceding every fact hypothetically stated in the instruction to have been proved, Did Dyson have such a *possessio pedis* as entitled him to recover? This court has repeatedly had occasion to define what constitute such a possession; and, under ordinary conditions, there is but little difficulty in applying the law to the facts. In *Coryell v. Cain*, 16 Cal. 573, which is a leading case in this State on that point, we define actual possession to be “a subjection to the will and dominion of the claimant, and it is usually evidenced by occupation,

by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." In *Plume v. Seward*, 4 Cal. 96, it is said that to maintain an action on the ground of prior possession, "there must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership, such as recording deeds, paying taxes," etc. In *Wolf v. Baldwin*, 19 Cal. 313, in stating what kind of "actual occupation" was required under the Van Ness Ordinance, the Court says it was a "possession which is accompanied with the real and effectual enjoyment of the property." It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation, or cultivation, or other appropriate use, according to the locality and character of the particular premises. . . . It must, in other words, be an open, unequivocal, actual possession — notorious, apparent, uninterrupted and exclusive — carrying with it marks and evidences of ownership, which apply in ordinary cases to the possession of real property."

But we need not multiply authorities on a point concerning which there can be little or no difference of opinion. The only difficulty lies in the application of these principles to the case at bar. It is clearly established, both by reason and authority, that the acts of ownership and dominion over land, which may be sufficient to constitute an actual possession, vary according to the condition, size and locality of the tract. If it contain but one acre, and have upon it a valuable quarry of stone or marble, and be not adapted to any other use than as a quarry, and if it be openly claimed and actually and notoriously used for that purpose, for a reasonable time, this might be such an act of dominion over it as to establish an actual possession, even though there was no inclosure or residence upon it. So if it be a small parcel, containing a mine, the working of the mine, in the usual manner, might establish an actual possession at common law, without the aid of our mining laws and in the absence of any inclosure. But if the tract contain one thousand acres, with a mine or a quarry on one margin of it, no one would maintain that the mere working of the mine or quarry, without other acts of ownership, would establish a possession of the whole tract. This proposition is well illustrated by the case of *Ewing v. Burnet*, 11 Pet. 41, in which the contest related to a rugged lot in the city of Cincinnati, only valuable for the sand and gravel which it afforded for the use of the inhabitants. The lot was not inclosed or inhabited; but the party who claimed it resided in the vicinity, and for a series of years sold sand and gravel from it, issued licenses to others to dig sand and gravel there and sued trespassers upon it. The Supreme Court held these acts of dominion to be sufficient to establish an adverse pos-

session. In delivering the opinion of the court, Justice Baldwin says: "Neither actual occupation, cultivation or residence are necessary to constitute actual possession, when the property is so situated as not to admit of any permanent, useful improvement; and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim."

The same principle might be illustrated by numerous examples. Acts of dominion over a town lot, which would be sufficient to establish an actual possession, might be wholly inadequate to that end, as applied to a tract of one thousand acres; and, on the other hand, the herding of cattle, for a reasonable time, on a tract of one hundred acres, suitable only for that purpose, and accompanied by a claim of title, might, under certain circumstances, establish possession of it; whilst the pasturing of cattle on a town lot, suitable only for building purposes, would be wholly insufficient. The general principle which underlies all this class of cases is, that the acts of dominion must be adapted to the particular land, its condition, locality and appropriate use. The philosophy of the rule is, that by such acts the party proclaims to the public that he asserts an exclusive ownership over the land, and the acts which he performs are in harmony with his claim of title. Hence they must be such as to give notice to the public; or, in the language of Justice Baldwin, in *Wolf v. Baldwin, supra*, it must be "an open, unequivocal, actual possession — notorious, apparent, uninterrupted and exclusive — carrying with it the marks and evidences of ownership."

In this case the court held, as a conclusion of law, that by repairing the wall and ditch, and using the land for pasturage, if it was suitable for that purpose, and, if the inclosure was sufficient to turn cattle, Dyson did all that was necessary to notify the public of his claim, and to establish an actual possession in law.

If Treat had inclosed the Potrero by a fence or ditch entirely around it, and sufficient to turn cattle, it would not admit of discussion, that, by the inclosure alone, and without other acts of dominion, he would have established an actual possession of the land. An inclosure of that character is, in itself, sufficient proof of an actual possession. But it is so, only because the erection of the artificial barrier is an open, notorious act of dominion, proclaiming in unmistakable terms to the public that the land is appropriated and set apart from the adjoining lands for the exclusive use of the person who erected the barrier. A mere *intention* to occupy land, however openly proclaimed, is not possession. The intention must be carried into actual execution by such open, unequivocal and notorious *acts* of dominion, as plainly indicate to the public that the person who performs them has appropriated the land and claims

the exclusive dominion over it. Anything short of this is not what the law denominates actual possession. A substantial inclosure, erected by the party around the entire tracts, is such an act of dominion, and has been held by the courts to be of itself sufficient to establish the possession. Nor can it be doubted that a sufficient inclosure, partly by artificial and partly by natural barriers, may, under certain circumstances, establish an actual possession. If, for example, a tract be inclosed on three of its sides by a substantial fence, and the fourth side front upon the ocean, or a deep river, or a precipitous cliff, the erection of the fence would, doubtless, clearly enough indicate to the public that the land was appropriated; or, if there be a small peninsula, containing but a few acres, a fence across the neck of it might accomplish the same result. But it is evident that where natural barriers form much the greater portion of the inclosure, the rule to which we have adverted is not of universal application, but must be varied according to the circumstances of each particular case. A fence or ditch across the neck of a small peninsula could not well escape observation, and would bear such a relation to the land, and to the natural use of it, as to indicate clearly to every one who saw it, that it was intended to segregate the peninsula from the adjoining lands, and that it had been appropriated by the person erecting the barrier. As was said by the court, in *Wolf v. Baldwin*, it would be such an act of dominion as to carry with it "the marks and evidences of ownership, which apply, in ordinary cases, to the possession of real property." But the same rule could not, without absurdity, be applied to all peninsulas, however large and howsoever situate. The city of San Francisco is situate on a peninsula, containing many square leagues of land; at the narrowest point of which, in the vicinity of Redwood City, it is but a few miles across the neck from the bay of San Francisco to the shore of the ocean.

If the rule we are discussing was of universal application, a fence from Redwood City to the seashore, including the entire peninsula, would establish an actual possession — a *possessio pedis* of the whole of it; and if the rule were universal and without qualification, the same result would follow if the peninsula were ten times as large as it is. The courts should hesitate long before establishing a rule of such universal application, as to lead to these absurd results. But such cases do not come within the reason of the rule which permits a party, under certain circumstances, to adopt and avail himself of natural obstructions as a part, or, it may be, the whole of an inclosure, in making out a case of actual possession. If the peninsula be so large, or, for any reason, be so situated that it would be contrary to the experience of mankind, and our observation of the motives which govern men in their daily pursuits, that any one should seek to acquire exclusive dominion over it by means of a fence or ditch, then it could not be held, without an absurdity, that the fence or



ditch should, in law, be deemed to be, in itself, such an act of dominion as to establish a *possessio pedis*. The whole theory of a *possessio pedis* rests upon the assumption that the acts of dominion which establish it, are such open, notorious acts of ownership, as usually accompany the possession of real property, and naturally spring from a claim of exclusive dominion. They must not only carry with them the *usual indicia* of ownership, but they must be open, notorious and unequivocal, so as to notify the public that the land is appropriated. If these be not necessary ingredients in a *possessio pedis*, and if a fence across the neck of a peninsula, however large or howsoever situate, be all that is requisite to establish such a possession, no reason is perceived why a fence across the isthmus of Darien might not be held to establish a possession in fact of the continent of North America. These extreme cases are referred to only to illustrate the proposition that where the inclosure consists partly of natural and partly of artificial barriers, or wholly of natural obstructions, as in the case of an island, it does not follow, as a conclusion of law, that *every* such inclosure, which is sufficient to turn cattle, establishes, *of itself*, a *possessio pedis*; but it must depend on the particular circumstances of each case, considering the size of the tract, its peculiar condition and the relative proportions which the natural barriers bear to the artificial, and the greater or less notoriety which, under all the circumstances which surround the tract, the artificial barriers, or other acts of ownership, exercised over the property, give to the claim of dominion.

To avoid misconception on this point, we will illustrate the proposition by an example: It is a well-known fact that the island of Santa Catalina, lying off the coast of this State, contains about fifty thousand acres, and is surrounded by the waters of the Pacific Ocean, which, of course, form a complete barrier against cattle. In other words, it is completely inclosed by impregnable, natural barriers. If one should desire to acquire the actual possession, the *possessio pedis*, of this whole island, it would not be necessary to erect artificial obstructions around it, for nature has already inclosed it more securely than man could do. He might adopt these natural obstructions as his inclosure, and they would doubtless form an important link in the chain of facts tending to establish a *possessio pedis*; but he must perform other and sufficient acts of ownership to render his claim of exclusive dominion apparent and notorious. If he should go upon the island and erect a hut in the center of it, and proclaim, in words, that he claimed the whole island, would this, of itself, establish in him the actual possession of the whole? No respectable court would uphold so preposterous a claim. Nor would it materially strengthen his claim of exclusive dominion, if it should appear that he pastured a few cattle or cultivated a patch of land on the island, for the obvious reason that these trivial acts of ownership are not the

usual and natural means by which exclusive dominion is acquired or exercised over so large a body of land, similarly situated, and would tend, in a very small degree, to give notoriety to his claim, and to inform the public that the whole island was appropriated for his exclusive use. On the contrary, if he should settle upon the island with the intention to acquire the possession of it, should pasture large herds of cattle upon it, allowing them to roam all over it, or cultivate extensive fields on various portions of it, should prevent others from landing on it, should cut timber or open mines and quarries on many remote parts of it, these would probably be held to be such acts of dominion as to establish a *possessio pedis* of the whole. If the island contained but a few acres, much fewer and less important acts of dominion would suffice to establish the possession, for the reason that they would sufficiently serve to render the claim of dominion apparent and notorious. The general principle pervading all this class of cases, where the inclosure consists wholly or partially of natural barriers, is, that the acts of dominion and ownership which establish a *possessio pedis* must correspond, in a reasonable degree, with the size of the tract, its condition and appropriate use, and must be such as usually accompany the ownership of land similarly situated. But, in such cases, it is the peculiar province of the jury, under proper instructions from the court, to decide whether or not the acts of dominion relied upon, considering the size of the tract, its peculiar condition and appropriate use, were of such a character as usually accompany the ownership of lands similarly situated. As already stated, the erection of a fence across the neck of a small peninsula, might, of itself, under certain circumstances, be a sufficient act of dominion to establish an actual possession. But, in such cases, there can be no rule of universal application, and each case must depend on its own circumstances; and where an inclosure, consisting partly of natural and partly of artificial obstructions, is relied upon as, in itself, establishing a *possessio pedis*, it is the province of the jury, upon all the proofs, and considering the quantity, locality and character of the land, to decide whether or not the artificial barriers were sufficient to notify the public that the land was appropriated, and to impart to the claim of appropriation the notoriety and *indicia* of ownership which constitute so important an element in a *possessio pedis*. But, in the case at bar, this question was not submitted to the jury. On the contrary, the court instructed them that if Treat repaired the wall and ditch, so that thereafter they, together with the waters of the creeks and bay, formed an inclosure sufficient to turn cattle, and if the land was suitable for pasturage and was used by him for that purpose, and if Dyson succeeded to the right of Treat and also used the land for pasturage, then, that these acts established, in law, a *possessio pedis*. But, as already stated, it was the province of the jury, and not of the court, to decide what effect

should be given to the repairing of the wall and ditch as an act of dominion over the property; and whether or not this act, in connection with the pasturing of cattle on the land, considering its quantity, locality and character, was sufficient, under all the circumstances, to notify the public that the land was appropriated; and that Treat, first, and Dyson, as his successor, claimed and exercised the exclusive dominion over it. The court should have instructed the jury, that, if all the facts hypothetically stated in the second instruction were true, it was the province of the jury to decide, considering the quantity, quality and character of the land, whether or not these acts of dominion were sufficient and had the effect, upon the facts proved, to give notice to the public that Treat, first, and Dyson, as his successor in interest, had appropriated the land and claimed the exclusive dominion over it; and if this be answered in the affirmative, then, that there had been established in Treat, first, and, afterwards in Dyson, an actual possession. The vice in the instruction which was given is, that the court assumed, as a conclusion of law, from the facts hypothetically stated, that if Treat and Dyson performed these acts, they had done all that was necessary to appropriate the land, and to give notice by their acts to the public, that they claimed the exclusive dominion over it; whereas, as we have seen, it was the peculiar province of the jury to decide upon the sufficiency of the acts to impart the requisite notice to the public, and whether or not, under all the circumstances, these acts were such as carried with them "the marks and evidences of ownership, which apply, in ordinary cases, to the possession of real property."

For these reasons, the judgment should be reversed and a new trial ordered.

NOTE. — In *Brooks v. Bruyn*, 18 Ill. 539, 542, the court said: "It is impossible to specify the particular acts, under every condition, which would constitute actual possession of land, as against a stranger or trespasser. They are as various as the uses to which land is adapted. As a general rule, it is sufficient if the land is appropriated to individual use in such manner as to apprise the community, or neighborhood in its locality, that the land is in the exclusive use and enjoyment of another."

In *Jackson v. Schoonmaker*, 2 Johns. (N.Y.) 230, the title to the land in question was in the plaintiff, unless the defendant had acquired title by adverse possession. The defendant proved that, there being a rumour of the plaintiff's claim, the part claimed by him had been enclosed "by a possession fence, which was made by trees felled, and lapping one upon another," and that such fence had ever since been kept up. KENT, C. J., said: "This mode of taking possession is too loose and equivocal. There must be a real and substantial inclosure, and actual occupancy, a *possessio pedis*, which is definite,

positive and notorious, to constitute an adverse possession, when that is the only defense, and is to countervail a legal title."

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PLUME v. SEWARD.

4 California, 94. 1854.

MR. CH. J. MURRAY delivered the opinion of the Court. Mr. J. HEYDENFELDT concurred.

This was an action of ejectment to recover a lot in the city of Marysville. On the trial of the cause, the plaintiff proved that Covillaud and others, from whom he claimed, were, in the year 1849, in possession of a tract of land, lying between the Yuba River and a slough, which was enclosed by a ditch on each side, running from the river to the slough; and had within said enclosure a trading post, a corral and a wheat field. The lot in dispute was not a portion of the wheat field or corral, but was included in the premises thus designated or enclosed by them; their right of possession remaining unquestioned and undisturbed.

This land was afterwards laid out into lots and streets, upon the official map of the city of Marysville, many of which were sold by said Covillaud and others.

There is no pretence of an abandonment of the premises thus enclosed; but evidence that Covillaud continued to assert title and exercise acts of ownership over them.

On the trial of the cause, the court rendered a judgment of nonsuit, on the ground that the plaintiff had not shown such a possession as entitled him to recover.

At the last term of this court we decided, possession was *prima facie* evidence of title, and sufficient to maintain ejectment. What acts of ownership were necessary to constitute possession was not involved in that decision.

From a careful examination of the authorities, I am satisfied, there must be an actual *bona fide* occupation, a *possessio pedis*, a subjection to the will and control, as contradistinguished from the mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc.

This being the case, it becomes necessary to inquire, if a party who enters on land with no higher claim of title than that which the law presumes from his possession, is entitled to claim more than the quantity thus actually occupied by him.

This question has been frequently decided in most of the Western States, where entries have been made upon public lands by persons unable to reduce the whole of the lands to actual occupation by fencing and cultivation. These entries have for the most part

been made by settlers claiming 160 acres under pre-emption laws, or some local custom on the subject.

In many cases the occupation of a portion of the land and the blazing of trees, so as to distinctly mark the extent and boundaries of the claim, have been held to operate as notice, and carry the possession to the whole tract; so the felling of timber around a tract of land, and the building of a brush fence, have been held as sufficient acts of the party in occupation of a part, to draw after them the possession of the land so enclosed.

The character of the improvement must, in a great measure, depend upon the locality. It is not necessary the occupant should cultivate the property thus claimed; it is sufficient if it be subjected to his use in the manner pointed out. Neither is any particular kind of enclosure required where a party is in possession of land marked by distinct monuments of boundary, whether the same be a natural or artificial enclosure. Claiming title to the whole tract, the possession of the part so occupied will draw after it the possession of the whole.

It is said that this doctrine would give to Covillaud and others all the land claimed by them running from Yuba River to the mountains. We know nothing of their claim; but if they should establish their possession in the manner already indicated, we can see no reason for a different rule.

Laying off the premises into town lots, selling the same, and exercising other acts of ownership over them, does not operate as an abandonment, but taken in connection with previous acts of ownership, would rather seem to strengthen the plaintiff's possession.

From this it follows, that the court below erred in ordering the plaintiff to be nonsuited. The evidence of the character of the possession, and the nature of the enclosure, were before the jury, and they ought to have been allowed to pass on the sufficiency of them.

*Judgment reversed with costs and new trial ordered.*

NOTE. — In *Feirbaugh v. Masterson*, 1 Idaho, 135, the plaintiffs went upon a tract of land, and commenced enclosing it with a fence. The defendant came upon the tract, and the plaintiffs notified him that they claimed the land, pointing out the fence they were then engaged in building, and "further pointed out to him the general boundaries of their claim as accurately as they well could do." The plaintiffs were residing on the tract at the time. The defendant nevertheless proceeded to enclose a tract of land included within the limits pointed out to him as the lines bounding plaintiffs' claim. The plaintiffs continued at work until they completed their fence. The plaintiffs were held to have been in prior possession of the land enclosed by the defendant.

## SECTION 3.

## POSSESSION PREDICATED UPON OWNERSHIP.

## GILLESPIE v. DEW.

1 Stewart (Ala.), 229. 1827.

IN Greene Circuit Court, James Gillespie declared in trespass against Duncan Dew, that the defendant broke and entered his close, and cut down and carried away sundry timber trees, etc. General issue. Verdict and judgment for defendant. On the trial the plaintiff proved title to the land, and that the defendant had cut timber thereon and carried it away, while the plaintiff was so entitled. It was proved that the plaintiff resided about twenty miles from the land. It did not appear that any one was in actual possession when the timber was cut, etc. The Circuit Court charged the jury that, unless the evidence shewed that the plaintiff by himself or agent was in actual possession of the land, when the trespass was committed, they must find for the defendant. To which the plaintiff excepted, and here assigned this matter as error. ✓

Judge WHITE delivered the opinion of the court.

The charge was in accordance with the English authorities, and with the decisions in some of the States of the Union. But in North Carolina, New York and Connecticut, it has been held that, where there is no adverse possession, he who has title, though he has never been in actual possession, may maintain the action of trespass. ✓

The situation of our country requires this modification of the English doctrine. In England, almost all the lands are occupied; but here, the proprietor often lives at a great distance from some of his lands which are not occupied by tenants, and unless they can maintain this action, they must be denied an important remedy for injuries to their property. Their right to this remedy is sustained by the strong argument of convenience, and by the respectable authorities referred to by the counsel for the plaintiff.

We are of opinion that, where there is no adverse possession, the title draws with it constructive possession, so as to sustain the action of trespass. Let the judgment be reversed and the cause be remanded.

Judge GAYLE not sitting.

## GOFF v. KILTS.

15 Wendell (N.Y.), 550. 1836.

ERROR from the Madison common pleas. Kilts sued Goff in a justice's court in *trespass* for taking and destroying a swarm of bees, and the honey made by them. The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered. Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others. The plaintiff recovered judgment, which was affirmed by the Madison common pleas. The defendant sued out a writ of error.

*By the Court, NELSON, J.* Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. Bees are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is, hiving, or enclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature by experience and practice has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant — in other words, to the person who first hives them; but if a swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them. Under these circumstances, no one else is entitled to take them. 2 Black. Comm. 393. 2 Kent's Comm. 394.

The question here is not between the owner of the soil upon which the tree stood that included the swarm and the owner of the bees: as to him, the owner of the bees would not be able to regain his property, or the fruits of it, without being guilty of trespass. But it by no means follows, from this predicament, that the right to the enjoyment of the property is lost; that the bees therefore become again *feræ naturæ*, and belong to the first occupant. If a domestic or tame animal of one person should stray to the enclosure of another, the owner could not follow and retake it, without being liable for a trespass. The absolute right of property, notwithstanding, would still continue in him. Of this there can be no doubt. So in respect to the qualified property in the bees. If it continued in the owner after they hived themselves, and abode in the hollow tree, as this qualified interest is under the same protection of law as if absolute, the like

remedy existed in case of an invasion of it. It cannot, I think, be doubted, that if the property in the swarm continues while within sight of the owner — in other words, while he can distinguish and identify it in the air — that it equally belongs to him if it settles upon a branch or in the trunk of a tree, and remains there under his observation and charge. If a stranger has no right to take the swarm in the former case, and of which there seems no question, he ought not to be permitted to take it in the latter, when it is more confined and within the control of the occupant.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects an unreclaimed swarm. While it remains there in that condition, it may, like birds or other game (game laws out of the question), belong to the owner or occupant of the forest, *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarm would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser, and as such liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says, if a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. 2 Black. Comm. 419. But if animals *feræ naturæ* that have been *reclaimed*, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues, and though he cannot pursue and take them without being liable for a trespass, still this difficulty should not operate as an abandonment of the animals to their former liberty. The rights of both parties should be regarded, and reconciled as far as is consistent with a reasonable protection of each. The cases of *Heermance v. Vernay*, 6 Johns. R. 5, and *Blake v. Jerome*, 14 *id.* 406, are authorities for saying, if any were wanted, that the inability of the owner of a personal chattel to retake it while on the premises of another, without committing a trespass, does not impair his legal interest in the property. It only embarrasses the use or enjoyment of it. The owner of the soil, therefore, acquiring no right to the property in the bees, the defendant below cannot protect



himself by showing it out of the plaintiff in that way. It still continues in him, and draws after it the possession sufficient to maintain this action against a third person, who invades it by virtue of no other claim than that derived from the law of nature. This case is distinguishable from the cases of *Gillet v. Mason*, 7 Johns. R. 16, and *Ferguson v. Miller*, 1 Cowen, 243. The first presented a question between the finder and a person interested in the soil; the other between two persons, each claiming as the first finder. The plaintiff in the last case, though the first finder, had not acquired a qualified property in the swarm according to the law of prior occupancy. The defendant had. Besides, the swarm being unreclaimed from their natural liberty while in the tree, belonged to the owner of the soil *ratione soli*. For these reasons, I am of opinion that the judgment of the court below should be affirmed.

*Judgment affirmed.*

## SECTION 4.

## SEPARATION OF THE CUSTODY OR USE FROM THE POSSESSION.

## HAMPTON v. BROWN.

13 Iredell, Law (N.C.), 18. 1851.

APPEAL from the Superior Court of Law of Davidson County, at the Fall Term, 1851, his Honor Judge ELLIS presiding.

This is an action of trover for a horse, and was tried on the general issue. The plaintiff was deputy sheriff, and had a *fiery facias* on a judgment in favor of one Hoffman against one Horne, by virtue of which he seized the horse. He did not, however, take the horse out of the possession of Horne, and the latter sold it to the defendant a few days afterwards, and, upon demand by the plaintiff, the defendant refused to give the horse up. The counsel for the defendant insisted that the action would not lie, because the plaintiff did not keep the possession of the horse, but left it with Horne, from whom the defendant purchased; and, also, because the defendant, if liable at all, was liable at the suit of the sheriff, and not of the plaintiff. But the Court instructed the jury, that upon these facts the plaintiff was entitled to recover; and, after a verdict and judgment against him, the defendant appealed.

RUFFIN, C. J. Although a sheriff may have trover, or trespass for goods seized in execution, which are taken by another, yet his deputy cannot. The reason why the sheriff has the action, is, that the debtor is discharged, and the sheriff becomes liable to the value of the goods, and therefore the law vests the property in him. *Wilbraham v. Snow*, 2 Saund. 47. But the law charges the deputy with no duty to the creditor. If he makes defaults in serving the execution, he cannot be sued for it, but his principal only. On the contrary, when he takes goods on execution the sheriff becomes answerable for their value to the creditor, and hence the property vests in the sheriff and not in the deputy. It was suggested that the deputy held as the bailee of the sheriff, and thus had a special property. He, however, is not a bailee, in the sense of having a possession of his own, but he is merely the servant of his superior and holds for him. The plaintiff, therefore, has no property in the horse, and cannot have this action.

PER CURIAM. Judgment reversed, and *venire de novo*.

NOTE. — In *Hopkinson v. Gibson*, 2 Smith, 202, Lord ELLENBOROUGH said: "You cannot make my servant, whose possession is my possession, my bailee." But an employee may be a bailee, and not a mere servant. *Harris v. Smith*, 3 S. & R. (Pa.) 20.

In *Hickie v. Starke*, 1 Peters (U.S.), 94, the court was considering the question whether the plaintiff was an "actual settler" on land within the meaning of that phrase as used in the act of Cession by Georgia to the United States. MARSHALL, C. J., said (p. 98): "The court is disposed to think that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient, though the proprietor should not reside in person on the estate or within the territory."

### BLOSS v. HOLMAN.

Owen, 52. 1587.

JOHN BLOSS brought an action of trespass, *quare vi et armis*, for taking of his goods, against Holman, and the defendant pleaded not guilty, and the jury gave a special verdict, namely, that the plaintiff at the time of the trespass was of the Mystery of the Mercers, and that at that time the defendant was his servant, and put in trust to sell his goods and merchandises in *shopa sua*, *ibidem de tempore in tempus*, and that he took the goods of the plaintiff named in the declaration, and carried them away, and prayed the advice of the court, if the defendant were culpable or not; and upon the *postea* returned, *Shuttleworth* prayed judgment for the plaintiff. ~~And the doubt was because the declaration was *quare vi et armis*, because it appeared that the defendant had custody of the goods; but *Shuttleworth* doubted whether he had custody, and cited the case of Littleton, namely, If I give my sheep to pasture, etc., and he kills them, an action of trespass lies; and the justices held that in this case the action did well lie; and *Periam* said that the defendant had only an authority, and not custody or possession; and judgment was given for the plaintiff. 3 H. 7, 12; 21 H. 7, 14. And *WINDHAM* said, that if he had embezzled his master's goods, without question it was felony. *Quod fuit concessum* (*ANDERSON* absent), and the law will not presume that the goods were out of the possession of the plaintiff; and the next day came the Lord *ANDERSON* and rehearsed the case, and said, that the defendant had neither general nor special property in the goods, for it is plain he could have no general property, and special he had not, for he could not have an action of trespass if they were taken away; then if he had no property, a trespass lies against him, if he take them; so if a shepherd steal sheep, it is felony, for he hath no property in them.~~

## FITZGERALD v. ELLIOTT.

162 Pa. 118. 1894.

OPINION BY MR. JUSTICE MCCOLLUM, May 31, 1894:

This is an appeal from the refusal of the court below to take off a compulsory nonsuit in an action against a sheriff for levying upon and selling a quantity of logs on an execution against A. Maxwell, who was the owner of a sawmill, and engaged in the business of manufacturing lumber. It appears from the evidence in the case that Maxwell owned the timber which had been cut and peeled on the Dixon tract; that he employed the plaintiff to cut the timber into logs and put them in the mill pond, and that the logs levied on and sold by the sheriff were cut and skidded by the plaintiff on said tract where they were at the time of the sale. The logs were the property of Maxwell, but the plaintiff claimed a lien upon them for his labor. It also appears from the evidence that the sheriff did not at any time remove the logs, that the only possession he had of them was such as was imputable to the levy, and that the purchaser at the sale removed them subsequently thereto. It should be stated in this connection that it appears by the sheriff's return that from the time of the levy to the time of the sale he left the property levied upon in charge of A. W. Foster. The learned trial judge thought that upon these uncontroverted facts the sheriff was not liable to the plaintiff in an action of trespass.

It seems to us that the first question presented for our consideration is whether the plaintiff had a common-law lien upon the logs. If we concede that he had such a lien, we are then to inquire whether there was such interference with or disturbance of the property bound by it as rendered the sheriff a trespasser in making the levy and sale.

It is indispensable to the existence of a common-law lien that the party who claims it should have an independent and exclusive possession of the property. Had the plaintiff such possession of the logs? They were not on his land. They were on the Dixon tract, but whether Maxwell purchased it with the timber, the evidence does not inform us, nor is it material. The possession of the timber was in the owner of it, and that possession was not changed or affected by the arrangement under which the logs were cut and skidded by the plaintiff. The latter was not a bailee of the timber or of the logs cut therefrom. He was employed to cut the timber into logs and put them in his employer's mill pond. There was nothing in the nature of his employment which gave him an independent and exclusive possession of the timber or the logs at any time, but on the contrary the agreement under which he was to do the work was inconsistent with his claim of a right to the possession of them until he was paid for his labor. He cut and skidded the logs where

his employer had the right to cut and skid them preparatory to their removal to his mill. If the plaintiff had a common-law lien upon the logs for his work, then he who cuts firewood or splits rails from his employer's timber and hauls or agrees to haul the firewood to his employer's house, or the rails to designated points on his farm for the purpose of fencing it, has a like lien. And if this be so, then the person who is employed to dig coal in his employer's mine and pile it at the pit's mouth on his employer's land has a common-law lien upon the coal for his labor in digging and piling it. But in *Ritter v. Gates*, decided at Pittsburg in 1852, it was held by this court, in an opinion by Chief Justice BLACK, that a laborer employed to dig ore has no lien upon it for his wages: 1 Am. Law Register, 119.

The cases cited in support of the plaintiff's claim are not analogous to the case at bar. They were cases in which the lienor had an independent possession of the property as a bailee, or in which the lien was created by the agreement of the parties. In this case there was no bailment or stipulation for a lien.

The fundamental error in the plaintiff's contention lies in his assumption that he had an independent possession of the property, when in fact such possession as he had was that of his employer. Maxwell was in possession of the Dixon tract for the work the plaintiff did for him there, whether he owned it or not; the land on which the timber lay and the logs were cut and skidded was in his possession for the purpose for which his employer used it. It follows that the rights of the plaintiff in respect to the lien and possession were the same as if his employer owned the land on which the work was done. In cutting and skidding the logs where he did he was exercising his employer's right to cut and skid them there.

We conclude upon a careful consideration of the plaintiff's testimony in reference to the agreement under which he did the work, that he was not entitled to a common-law lien upon the logs, and that if he had a statutory lien or preference for all or part of his claim, it did not make the sheriff a trespasser in levying upon and selling them. If he had a statutory lien or preference he should have looked to the fund realized by the sale, and proceeded for the enforcement of it in accordance with the provisions of the statute which conferred it. It follows from these views that the learned court did not err in denying the motion to take off the nonsuit.

The specifications of error are overruled.

*Judgment affirmed.*

## STATE v. SCHINGEN.

20 Wis. 74. 1865.

ON exceptions from the Circuit Court for Winnebago County.

The defendant was indicted for larceny of two horses and a set of harness, the property of one Buhler; and the jury having found him guilty, a new trial was refused. The principal questions presented by the defendant's exceptions arose upon instructions asked for by him and refused, the character of which will sufficiently appear from the opinion, *infra*.

COLE, J. The first instruction asked for on the trial by the defendant, however true as an abstract proposition of law, yet, without some explanation, was calculated to mislead the jury. The evidence shows most clearly that the defendant was in the employ of Buhler, and had been sent from Berlin with the team to take some beer to Omro and Waukau, with instructions to bring back the kegs, and money, returning by the way of Eureka the same day. It appears that, after disposing of most of the beer at Omro, the defendant threw the empty kegs and two full ones remaining unsold over the fence into a field at that place, and instead of returning to Berlin, drove off with the wagon and horses to Oshkosh, where he offered the horses for sale, and did actually sell the harness. By the instruction above referred to, the court was asked to charge the jury that without the commission of a trespass there could be no larceny, and that there could be no trespass unless the goods were taken by the accused while in the possession of the owner. The court gave this instruction with the additional remark, that if the accused was at work for the owner of the property, and the property was put into the prisoner's hands to go to Omro and other places, it remained in the owner's possession; and if the prisoner took it beyond the places he was to go to, for the purpose of converting it to his own use, this was a trespass. Now we think the explanatory remarks were very proper, in view of the facts of the case. For the evidence was most distinct and positive upon the point, that the defendant was in the employ of Buhler, and had been sent away by him with the wagon, horses, harness, beer, etc., for the purpose just stated. He was therefore the servant of Buhler, having only a bare charge or custody of the property, while the legal possession was in the owner. The relation of master and servant thus existing between the parties when the property was entrusted to the care of the defendant for a special purpose, in contemplation of law the possession was in the master, and the defendant might be guilty of a trespass and larceny in fraudulently converting it to his own use. This principle is fully established by the authorities to which the attorney general referred on the argument. Hence it was very proper for the court to accompany the

instruction with the remarks he made upon it, and tell the jury that if the defendant was at work for the owner of the property, and the property was put under his custody to go to Omro and other places, his possession was for the time being the possession of the master; and if the defendant took it beyond the places he was to go to, with the intent to convert it to his own use, he was guilty of trespass. Otherwise the jury might have possibly supposed, because the defendant had the property under his care and custody, he must likewise, necessarily have the possession, and could not therefore be said to take it from the possession of the owner.

The court was further asked to charge the jury, that if they should find from the evidence that the defendant had the property for the purpose of going to Omro and other places to carry the beer, and that at the time he took the property from the owner he really intended to use it for that purpose, and had no intention, at the time he took possession of it, to steal, but, finding himself in the possession, he afterwards formed the intention of converting it to his own use instead of using it for the purpose originally designed, then the taking would not amount to a felony, nor would it constitute larceny. This instruction is obviously incorrect, since it assumes that to constitute larceny the felonious intent must have existed when the defendant was first intrusted with the custody of the property. It was not necessary that the jury should find that the *animus furandi* existed at the time the defendant left Berlin for Omro. It was enough that the intention existed while he had charge of the property as servant to the owner, and that it was carried into effect by converting the property to his own use. *The People v. Call*, 1 Denio, 120; 2 Russell on Crimes, 157-8.

*By the Court.* — The exceptions in this case are overruled, and the judgment of the circuit court affirmed.

NOTE. — There are early authorities to the effect that the master is conceived to be in possession of goods entrusted to the servant only so long as the servant is in the master's house, or with the master. See Y. B. 21 Hen. 7, 14.

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### COMMONWEALTH v. RYAN.

155 Mass. 523. 1892.

HOLMES, J. This is a complaint for embezzlement of money. The case for the government is as follows. The defendant was employed by one Sullivan to sell liquor for him in his store. Sullivan sent two detectives to the store, with marked money of Sullivan's,

to make a feigned purchase from the defendant. One detective did so. The defendant dropped the money into the money drawer of a cash register, which happened to be open in connection with another sale made and registered by the defendant, but he did not register this sale, as was customary, and afterward — it would seem within a minute or two — he took the money from the drawer. The question presented is whether it appears, as matter of law, that the defendant was not guilty of embezzlement, but was guilty of larceny, if of anything. The defendant asked rulings to that effect on two grounds: first, that after the money was put into the drawer it was in Sullivan's possession, and therefore the removal of it was a trespass and larceny; and secondly, that Sullivan's ownership of the money, in some way not fully explained, prevented the offence from being embezzlement. We will consider these positions successively.

We must take it as settled that it is not larceny for a servant to convert property delivered to him by a third person for his master, provided he does so before the goods have reached their destination, or something more has happened to reduce him to a mere custodian (*Commonwealth v. King*, 9 Cush. 284); while, on the other hand, if the property is delivered to the servant by his master, the conversion is larceny. *Commonwealth v. Berry*, 99 Mass. 428; *Commonwealth v. Davis*, 104 Mass. 548.

This distinction is not very satisfactory, but it is due to historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offence. 2 Leach (4th ed.), 843, 848, note; 1 Leach (4th ed.), 35, note; 2 East, P. C. 568, 571.

The history of it is this. There was no felony when a man received possession of goods from the owner without violence. Glanv., bk. 10, c. 13. Y. B. 13 Edw. IV. 9, pl. 5. 3 Co. Inst. 107. The early judges did not always distinguish clearly in their language between the delivery of possession to a bailee and the giving of custody to a servant, which indeed later judges sometimes have failed to do. E.g. Littleton in Y. B. 2 Edw. IV. 15, pl. 7. Hen. VII. 12, pl. 9. *Ward v. Macauley*, 4 T. R. 489, 490. When the peculiar law of master and servant was applied either to the master's responsibility or to his possession, the test seems to have been whether or not the servant was under the master's eye, rather than based on the notion of *status* and identity of person, as it was at a later day. See *Byington v. Simpson*, 134 Mass. 169, 170. Within his house a master might be answerable for the torts of his servant, and might have possession of goods in his servant's custody, although he himself had put the goods into the servant's hands; outside the house there was more doubt; as when a master intrusted his horse to his servant to go to market. Y. B. 21 Hen. VII. 14, pl. 21. T. 24 Edw. III. Bristol, in Molloy, *De Jure Maritimo*, bk. 2, c. 3, § 16. Y. B. 2 Hen. IV. 18,



pl. 6. 13 Edw. IV. 10, pl. 5; *S. C. Bro. Abr. Corone*, pl. 160. Staundforde, I., c. 15, fol. 25; c. 18, fol. 26. 1 Hale, P. C. 505, note. See *Heydon & Smith's case*, 13 Co. Rep. 67, 69; *Drope v. Theyar*, Popham, 178, 179; *Combs v. Bradley*, 2 Salk. 613; and, further, 42 Ass. pl. 17, fol. 260; 42 Edw. III. 11, pl. 13; Ass. Jerus. (ed. 1690), cc. 205, 217. It was settled by St. 21 Hen. VIII. c. 7, that the conversion of goods delivered to a servant by his master was felony, and this statute has been thought to be only declaratory of the common law in later times, since the distinction between the possession of a bailee and the custody of a servant has been developed more fully, on the ground that the custody of the servant is the possession of the master. 2 East, P. C. 564, 565. *The King v. Wilkins*, 1 Leach (4th ed.), 520, 523. See Kelyng, 35; Fitzh. Nat. Brev. 91 E; *Blosse's case*, Moore, 248; *S. C. Owen*, 52, and Gouldsb. 72. But probably when the act was passed it confirmed the above-mentioned doubt as to the master's possession where the servant was intrusted with property at a distance from his master's house in cases outside the statute, that is, when the chattels were delivered by a third person. In *Dyer*, 5a, 5b, it was said that it was not within the statute if an apprentice ran off with the money received from a third person for his master's goods at a fair, because he had it not by the delivery of his master. This, very likely, was correct, because the statute only dealt with delivery by the master; but the case was taken before long as authority for the broader proposition that the act is not a felony, and the reason was invented to account for it that the servant has possession, because the money is delivered to him. 1 Hale, P. C. 667, 668. This phrase about delivery seems to have been used first in an attempt to distinguish between servants and bailees; Y. B. 13 Edw. IV. 10, pl. 5; Moore, 248; but as used here it is a perverted remnant of the old and now exploded notion that a servant away from his master's house always has possession. The old case of the servant converting a horse with which his master had intrusted him to go to market was stated and explained in the same way, on the ground that the horse was delivered to the servant. Crompton, Just. 35b, pl. 7. See *The King v. Bass*, 1 Leach (4th ed.), 251. Yet the emptiness of the explanation was shown by the fact that it still was held felony when the master delivered property for service in his own house. Kelyng, 35. The last step was for the principle thus qualified and explained to be applied to a delivery by a third person to a servant in his master's shop, although it is possible at least that the case would have been decided differently in the time of the Year Books; Y. B. 2 Edw. IV. 15, pl. 7; Fitzh. Nat. Brev. 91 E, and although it is questionable whether on sound theory the possession is not as much in the master as if he had delivered the property himself. *Rex v. Dingley* (1687), stated in *The King v. Bazeley*, 2 Leach (4th ed.), 835, 841, and in *The King v. Meeres*, 1 Show. 50, 53. *Waite's case*

(1743), 2 East, P. C. 570; *S. C. 1 Leach* (4th ed.), 28, 35, note. *Bull's case*, stated in *The King v. Bazeley*, 2 Leach (4th ed.), 835, 841; *S. C. 2 East*, P. C. 571, 572. *The King v. Bazeley*, *ubi supra*; *Regina v. Masters*, 1 Den. C. C. 332. *Regina v. Reed*, Dears. C. C. 257, 261, 262.

The last-mentioned decisions made it necessary to consider with care what more was necessary, and what was sufficient, to reduce the servant to the position of a mere custodian. An obvious case was when the property was finally deposited in the place of deposit provided by the master, and subject to his control, although there was some nice discussion as to what constituted such a place. *Regina v. Reed*, Dears. C. C. 257. No doubt a final deposit of money in the till of a shop would have the effect. *Waite's case*, 2 East, P. C. 570, 571; *S. C. 1 Leach* (4th ed.), 28, 35, note. *Bull's case*, 2 East, P. C. 572; *S. C. 2 Leach* (4th ed.), 841, 842. *The King v. Bazeley*, 2 East, P. C. 571, 574; *S. C. 2 Leach* (4th ed.), 835, 843, note. *Regina v. Wright*, Dears. & Bell, 431, 441. But it is plain that the mere physical presence of the money there for a moment is not conclusive while the servant is on the spot and has not lost his power over it; as, for instance, if the servant drops it, and instantly picks it up again. Such cases are among the few in which the actual intent of the party is legally important; for, apart from other considerations, the character in which he exercises his control depends entirely upon himself. *Sloan v. Merrill*, 135 Mass. 17, 19. *Jefferds v. Alward*, 151 Mass. 94, 95. *Commonwealth v. Drew*, 153 Mass. 588, 594.

It follows from what we have said, that the defendant's first position cannot be maintained, and that the judge was right in charging the jury that, if the defendant before he placed the money in the drawer intended to appropriate it, and with that intent simply put it in the drawer for his own convenience in keeping it for himself, that would not make his appropriation of it just afterwards larceny. The distinction may be arbitrary, but, as it does not affect the defendant otherwise than by giving him an opportunity, whichever offence he was convicted of, to contend that he should have been convicted of the other, we have the less uneasiness in applying it.

*Exceptions overruled.*

NOTE. — See *Rex v. Bazeley*, 2 East, P. C. 571; *Commonwealth v. King*, 9 Cush. (Mass.) 284. Cf. *State v. Brin*, 30 Minn. 522.

As to the acts which will change the servant's possession of goods, received from a third person for the master, into custody, see *Regina v. Reed*, 6 Cox, C. C. 284; *Regina v. Hayward*, 1 C. & K. 518; *Washington v. State*, 106 Ala. 58; *Warmoth v. Commonwealth*, 81 Ky. 133.

## ANONYMOUS.

Liber Assisarum, 137, pl. 39. 1353.

ONE A. was arraigned with the mainor, sc. a coverlet and two sheets; and he put himself on his clergy. And it was found by the inquest that he was a guest at the house of a man of note, and was lodged within these bedclothes; and it was found that he got up before day, and took these bedclothes out of the chamber, and carried them into the hall, and went off to the stable to find his horse; and his host summoned his household against him. And it was asked of the inquest whether he carried the bedclothes into the hall with intent to have stolen them; and they said yes. Wherefore he was adjudged a felon, and was delivered to the ordinary, because he was a clerk, etc.

NOTE. — See also *Richards v. Commonwealth*, 13 Gratt. (Va.) 803.

## HILDEBRAND v. PEOPLE.

56 N.Y. 394. 1874.

CHURCH, Ch. J. The prosecutor handed the prisoner, who was a bar-tender in a saloon, a fifty dollar bill (greenback) to take ten cents out of it in payment for a glass of soda. The prisoner put down a few coppers upon the counter, and when asked for the change, he took the prosecutor by the neck and shoved him out doors, and kept the money.

The question is presented on behalf of the prisoner whether larceny can be predicated upon these facts. There was no trick, device or fraud in inducing the prosecutor to deliver the bill; but we must assume that the jury found, and the evidence was sufficient to justify it, that the prisoner intended, at the time he took the bill, feloniously to convert it to his own use.

It is urged that this is not sufficient to convict, because the prosecutor voluntarily parted with the possession not only, but with the property, and did not expect a return of the same property. This presents the point of the case. When the possession and property are delivered voluntarily, without fraud or artifice to induce it, the *animus furandi* will not make it larceny, because in such a case there can be no trespass, and there can be no larceny without trespass (43 N.Y. 61). But in this case I do not think the prosecutor should be deemed to have parted either with the possession of, or property in, the bill. It was an incomplete transaction, to be consummated in the presence and under the personal control of the prosecutor.

There was no trust or confidence reposed in the prisoner, and none intended to be. The delivery of the bill and the giving change were to be simultaneous acts, and until the latter was paid, the delivery was not complete. The prosecutor laid his bill upon the counter, and impliedly told the prisoner that he could have it upon delivering to him \$49.90. Until this was done neither possession nor property passed; and in the mean time the bill remained in legal contemplation under the control and in the possession of the prosecutor. This view is not without authority. The case of *Reg. v. McKale*, 11 Cox, C. C. 32, is instructive. The prosecutrix put down two shillings upon the counter, expecting to receive small change for it from the prisoner. There being several pieces on the counter, the prosecutrix took up a shilling of the prisoner's money, and a shilling of her own, which she did not discover until she was putting them in the drawer. A confederate just then attracted her attention, and the prisoner passed out with the two shillings. It was held upon full consideration that the conviction for stealing the two shillings was right. KELLY, C. B., said: "The question is, did she part with the money she placed on the counter? I say, certainly not, for she expected to receive two shillings of the prisoner's money in lieu of it. . . . Placing the money on the counter was only one step in the transaction. The act of the prisoner in taking up the money does not affect the question whether the prosecutrix parted with the property in it. The property is not parted with until the whole transaction is complete, and the conditions have been fulfilled on which the property is to be parted with. . . . I am of the opinion that the property in the two shilling piece was not out of the prosecutrix for a moment."

In *Reg. v. Slowly*, 12 Cox, C. C. 269, the prosecutor sold onions to the prisoners who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor signed a receipt at the request of the prisoners, when they refused to restore the onions or pay the price. A conviction for larceny was held right; the jury having found the original intention felonious. This was upon the ground that the delivery and payment were to be simultaneous acts, that the property did not pass until payment, and that no credit or trust was intended. (See also *id.* 257, 248; 2 Russ. on Cr. 22.)

The counsel for the prisoner relies upon the case of *Reg. v. Thomas*, 9 C. & P. 741. There the prosecutor permitted the prisoner to take a sovereign to go out to get it changed. The court held that the prisoner could not be convicted of larceny, because he had divested himself of the entire possession of the sovereign and never expected to have it back. This was a *nisi prius* decision, and is not as authoritative for that reason, but the distinction between that case and this is the one first suggested. There all control, power and possession was parted with, and the prisoner was intrusted with the money,

and was not expected to return it. Here, as we have seen, the prosecutor retained the control and legally the possession and property. The line of distinction is a narrow one, but it is substantial and sufficiently well defined.

The judgment must be affirmed. All concur.

*Judgment affirmed.*

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DEAN v. HOGG.

10 Bingham, 345. 1834.

THE defendant *Lewis* hired a steamboat for a party of pleasure to *Richmond*, upon the terms disclosed in the following letter from the owner:—

"I note the *Adelaide* is engaged to you for *Richmond* or *Twickenham* for *Tuesday* the 28th of *May*, at the hire for the day of 5*l.* 10*s.*, your party not exceeding fifty persons."

The vessel was navigated by a captain and crew, employed and paid by the owner.

Just as she was about to start from a quay in London, the plaintiff, an attorney, a stranger to the defendant, stepped on board, not being aware that the vessel had been hired for the day by *Lewis*, and his embarkation being countenanced by the captain.

The plaintiff was not long in discovering that he had intruded into a private party, and expressed to some one near him his readiness to quit the vessel when an opportunity should present itself; but the person so addressed rather counselled him to stay. However, by the time the *Adelaide* had reached Battersea, it was generally bruited about that a stranger was on board. The ladies became alarmed; and *Hogg*, as the plaintiff alleged, in an imperious tone, ordered him to quit the vessel.

The plaintiff, irritated by what appeared to him a harsh manner of making a lawful request, refused to go; whereupon the defendants, after calling on the captain to remove the plaintiff, with considerable violence shoved him into a boat alongside, and, in so doing, tore off the skirts of his coat.

For this assault, the plaintiff now sued them in trespass; and having obtained a verdict for 10*l.* damages, the question, upon a motion to set aside the verdict and enter a nonsuit instead, was, whether, under the above contract with the owner, *Lewis* had such possession of the steam vessel as to support the defendant's second plea, which alleged that *Lewis* was lawfully possessed of the steam vessel mentioned in the declaration; that the plaintiff was unlawfully in the steam vessel, from which he would not depart when requested; and then justified the committing of the trespasses by the defendants in

defence of the possession of Lewis, and in order to remove the plaintiff from the vessel.

TINDAL, C. J. The question which has been argued before us arises upon the second plea of the defendants, which alleges that Lewis, one of the defendants, was lawfully possessed of the steam vessel mentioned in the declaration; that the plaintiff was unlawfully in the steam vessel, from which he would not depart when requested; and then justifies the committing of the trespasses by the defendants in defence of the possession of Lewis, and in order to remove the plaintiff from the vessel.

And the question made at the trial, and argued before us, has been, whether, upon the facts proved, Lewis had such possession of the steam vessel as would authorise him to use force in removing the plaintiff from it.

The evidence, so far as it related to the possession of the vessel, was a letter from the owner to Lewis, in these terms: "I note the *Adelaide* is engaged to you for Richmond or Twickenham, at the hire for the day of 5*l.* 10*s.*, your party not exceeding fifty persons." The vessel was managed by the captain and crew belonging to the same.

There can be no doubt that, upon such a contract, although there is no express stipulation to that effect, the defendant Lewis would be entitled to the full enjoyment of the vessel for himself and his party free from the intrusion of any stranger. The circumstances of the case, and the object of the voyage necessarily imply it; so that if the captain afterwards admitted any other passengers for hire, or freight to Richmond (as in fact he did admit the plaintiff), such admission would amount to a breach of contract between him and Lewis, for which the latter might have recovered a compensation in damages.

There can also be no doubt but that, if the plaintiff had been a stranger intruding himself against the will or without the permission of the captain, the captain himself, or the passengers in his aid, and as his servants, might have justified turning him out. And this seems to have been the opinion of the defendants themselves, who called upon the captain to remove the plaintiff.

But the question still arises, whether, under this contract, Lewis had such an exclusive possession of the vessel, as would justify him in forcibly putting the plaintiff out of the vessel, admitted as he had been by the captain, in defence of his possession; and we think he had not. It must be admitted, that, in the case of *Hutton v. Bragg*, 2 Marsh. 339, cited by the defendant's counsel, the Court of Common Pleas held, that, by the charter of an entire ship, the possession was parted with to the charterer, so that the owner could have no lien for the freight upon goods put on board; but subsequent cases have narrowed the generality of this doctrine, and have decided, that the question, whether the possession of the ship has or has not been given up to, and taken by, the charterers, must depend upon the

terms of the instrument taken altogether, or upon the purpose and object of it. (See *Trinity House v. Clark*, 4 M. and S. 288, and *Yates and Others v. Railston*, 8 Taunt. 293.) Here there was no express contract for the exclusive possession of the vessel by Lewis. And there could be no object or purpose in considering the vessel as taken out of the possession of the owners, and put into the possession of Lewis. All that the defendant Lewis bargained for was, that he and his party should be carried by the captain and the crew on board the *Adelaide* to Richmond, without the addition of strangers; and such a contract might be well carried into effect, without considering the possession changed from the owners to Lewis. The captain and the crew, who continued in the management of the vessel, were the servants of the owners, not of Lewis. If any injury had been occasioned by the vessel, the owners, not Lewis, would have been answerable for the damages. There were some parts of the vessel manifestly not in the possession of the defendant Lewis, and some parts to which he had even no right of access or entry; such as the parts occupied by the crew, the room containing the machinery, and the like. If the captain had carried goods to Richmond for other persons, to any extent short of incommoding the defendant Lewis and his friends, the defendant could not have prevented it, either by removing the goods, or by action against the owners: — all which considerations tend to shew the possession was never given up. The case has been compared to that of a person put into possession of a room at an inn or tavern, where the guest (as it is alleged) might turn out by force any stranger who intruded himself, whether by leave of the innkeeper or without. Even admitting such to be the law, the cases are by no means similar. The sole and exclusive possession of the room is given to the guest: there is nothing more to be done by the landlord than to leave him in possession. It is the intent and object of the contract between the parties, that such possession should be exclusive and undisturbed. Even the innkeeper has parted with his right to enter for the time the guest is in possession, except for purposes manifestly implied by their relative situation, or for purposes allowed by law. But, in this case, the merely putting Lewis in possession of the vessel would have been nothing; the main part of the contract remained to be performed by the captain and crew; viz., the carrying them to Richmond and back again: for which purpose it was essential they should remain on board, and retain the management and conduct of the vessel. Looking, therefore, at the object and intention of all parties, we think the exclusive possession of the vessel did not pass to the party hiring the vessel for the limited purpose of being carried to Richmond and back, and, consequently, that the plea is not established. And we feel the more satisfied in not being obliged to disturb this verdict, because we think it meets the justice of the case.

*Rule discharged.*

## SMITH v. ST. MICHAEL, CAMBRIDGE.

3 E. &amp; E. 383. 1860.

HILL, J., now delivered the judgment of the court. In this case, which was argued before my Brother BLACKBURN and myself, we took time to consider whether the appellant was to be considered occupier of the whole of the house in respect of which he was rated, or whether five rooms and a closet in that house were in the occupation of the Commissioners of Inland Revenue. There is no doubt that exclusive possession of a part only of a house may be given, so as in effect to make the two parts of the house separate tenements; the question in the present case was, whether such possession had been given; and we are of opinion that it had not. The agreement between the appellant and the representatives of the Commissioners of Inland Revenue is set forth in the case. By it the appellant contracted to give to the Inland Revenue the exclusive enjoyment of five rooms and a closet in his house; and in the agreement it is expressed that the appellant "agrees to let" and the other party takes the rooms, and it is stipulated that "possession" shall be given and rent commence at a particular time, all of which are words properly applicable to a demise of the five rooms. But at the same time it is stipulated: "For the annual consideration of 90l.; this sum to include all expenses, namely, rent, rates, taxes, gas, wood, coals, also providing a trustworthy person to reside on the premises, to keep clean, light fires, and attend to the same." We think that we must look not so much at the words as the substance of the agreement; and, taking the whole together, we think it must be construed, not as a demise of the five rooms, but as an agreement by which the appellant, retaining possession of those rooms and keeping his servant there, bound himself to supply the other party there with fire and gas and attendance. It is true that the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn or a lodger in a house has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear that the possession remains in the innkeeper, lodging-house keeper, or ship-owner. We think, therefore, that the appellant was occupier of the whole of the rated property.

NOTE. — In *Allan v. Liverpool*, L. R. 9 Q. B. 180, BLACKBURN, J., said (p. 191): "This case involves difficult questions of fact, but if we get at the facts I do not think there is any difficulty at all about the law. The poor-rate is a rate imposed by the statute on the occupier, and that occupier must be the exclusive occupier, a person who, if there was a trespass committed on the premises, would be the person to bring an action of trespass for it. A lodger in a house, although



he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stored there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit*, the maintenance of the action depending on the possession." And see *Holmes v. Bagge*, 1 E. & B. 782.

In *Stocks v. Booth*, 1 T. R. 428, BULLER, J., said (p. 430): "Trespass will not lie for entering into a pew, because the plaintiff has not the exclusive possession; the possession of the church being in the parson."

In *Curtiss v. Hoyt*, 19 Conn. 154, the court said (p. 167): "The owner of a building can hardly be said to be out of possession, because he has leased the rooms, *as such*, to divers individuals."

## CHAPTER II.

### RIGHTS BASED UPON POSSESSION.

#### SECTION 1.

RIGHTS OF A PERSON WHO HAS POSSESSION BY REASON  
OF A TENANCY, BAILMENT, OR LAWFUL SEIZURE.

#### ZIMMERMAN v. SHREEVE.

59 Md. 357. 1882.

ALVEY, J., delivered the opinion of the court.

This was an action of trespass *quare clausum fregit* brought by the appellee, the plaintiff below, against the appellant. The plaintiff was only tenant for life of the premises upon which the alleged trespass was committed. The trespass complained of was the breaking the close, and the cutting down, and otherwise destroying, large quantities of growing timber thereon, and the carrying away of quantities of rails, posts, logs, tan bark, etc.

In the course of the trial below there were several bills of exception taken by the defendant; but the only question raised in this court, as we gather from the briefs submitted, is one with respect to the measure of damages, and that is raised upon the prayers which were granted by the court, at the instance of the plaintiff.

The gist of the action of trespass *quare clausum fregit* is the injury to the plaintiff's possession, and therefore, to maintain the action, it is essential that he be either in the actual or constructive possession of the *locus in quo*, at the time of the injury done. *Gent v. Lynch*, 23 Md. 58. The damages will vary, and must be measured, according to the interest of the plaintiff in the *locus in quo*. This rule of damages is founded upon obvious principles of justice, as otherwise the plaintiff might get extravagant recompense for the injury to the land, when his interest therein was limited, or upon the eve of expiring, and the defendant might be made liable for the same damages to different persons. It is well settled that the same acts of trespass may inflict injuries upon different rights, for which the defendant may be liable in several actions, to different persons, according to the nature and extent of the injury inflicted. In the case of a tenant, whether for life or for years, he may sue and recover

*Break. close,  
Place in wh.  
cause of action  
arise*

for the injury to his possession and right of enjoyment, and the reversioner or remainder-man may sue and recover for any injury sustained to the estate in reversion or remainder. And where there are several entitled in succession, as tenants for life, in tail, or in fee, they can recover only damages commensurate to the injury done to their respective estates. *Herlakenden's Case*, 4 Co. 63; *Briddlesford v. Onslow*, 3 Lev. 209; *Jefferson v. Jefferson*, *Id.* 130; *Jesser v. Gifford*, 4 Burr. 2141; *Evelyn v. Raddish*, Holt N. P. 543, *note*; *Twynam v. Knowles*, 13 C. B. 222; *Lane v. Thompson*, 43 N.H. 320. The damages, therefore, must be assessed with reference to the extent of the several interests affected.

NOTE. — See, *accord*, *George v. Fisk*, 32 N.H. 32, 45; and *Rockwood v. Robinson*, 159 Mass. 406 (in the latter case the tenant for life was allowed to recover full damages only because she had a power of disposition over the fee).

In *Beddingfield v. Onslow*, 3 Lev. 209, the defendant had done an injury to land which was under lease, and had paid the lessee a sum of money "which he accepted in satisfaction of the said trespass." The lessor sued, and the court held that the defendant's payment to the lessee was no defence, that the lessee might sue in respect of the prejudice done to the possession, and the lessor in respect of the prejudice done to the reversion, "and the satisfaction given to one is no bar to the other."

In *Willey v. Laraway*, 64 Vt. 559, the plaintiff, holding a dower estate, was allowed to recover for an injury to the reversion, on the ground that she was liable to the reversioner for injuries done by trespassers. The court further said (p. 563): "There is a privity of estate between the reversioner and the tenant in dower so that this judgment would be a bar to another action." And see *Perry v. Jefferies*, 61 S.C. 292, 314.

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## THE WINKFIELD.

[1902.] P. 42.

COLLINS, M.R. This is an appeal from the order of Sir Francis Jeune dismissing a motion made on behalf of the Postmaster-General in the case of *The Winkfield*.

The question arises out of a collision which occurred on April 5, 1900, between the steamship *Mexican* and the steamship *Winkfield*, and which resulted in the loss of the former with a portion of the mails which she was carrying at the time.

The owners of the *Winkfield* under a decree limiting liability to 32,514*l.* 17*s.* 10*d.* paid that amount into court, and the claim in

question was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal to recover out of that sum the value of letters, parcels, etc., in his custody as bailee and lost on board the *Mexican*.

The case was dealt with by all parties in the court below as a claim by a bailee who was under no liability to his bailor for the loss in question, as to which it was admitted that the authority of *Claridge v. South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, was conclusive, and the President accordingly, without argument and in deference to that authority, dismissed the claim. The Postmaster-General now appeals.

The question for decision, therefore, is whether *Claridge's Case* was well decided. I emphasize this because it disposes of a point which was faintly suggested by the respondents, and which, if good, would distinguish *Claridge's Case*, namely, that the applicant was not himself in actual occupation of the things bailed at the time of the loss. This point was not taken below, and having regard to the course followed by all parties on the hearing of the motion, I think it is not open to the respondents to make it now, and I therefore deal with the case upon the footing upon which it was dealt with on the motion, namely, that it is covered by *Claridge's Case*. I assume, therefore, that the subject-matter of the bailment was in the custody of the Postmaster-General as bailee at the time of the accident. For the reasons which I am about to state I am of opinion that *Claridge's Case* was wrongly decided, and that the law is that in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed.

It seems to me that the position, that possession is good against a wrongdoer and that the latter cannot set up the jus tertii unless he claims under it, is well established in our law, and really concludes this case against the respondents. As I shall shew presently, a long series of authorities establishes this in actions of trover and trespass at the suit of a possessor. And the principle being the same, it follows that he can equally recover the whole value of the goods in an action on the case for their loss through the tortious conduct of the defendant. I think it involves this also, that the wrongdoer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor and bailee, and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between him and the bailor.

I think this position is well established in our law, though it may be that reasons for its existence have been given in some of the cases which are not quite satisfactory. I think also that the obligation of the bailee to the bailor to account for what he has received in respect

of the destruction or conversion of the thing bailed has been admitted so often in decided cases that it cannot now be questioned; and, further, I think it can be shewn that the right of the bailee to recover cannot be rested on the ground suggested in some of the cases, namely, that he was liable over to the bailor for the loss of the goods converted or destroyed. It cannot be denied that since the case of *Armory v. Delamirie*, 1 Stra. 504, not to mention earlier cases from the Year Books onward, a mere finder may recover against a wrongdoer the full value of the thing converted. That decision involves the principle that as between possessor and wrongdoer the presumption of law is, in the words of Lord CAMPBELL in *Jeffries v. Great Western Ry. Co.*, 5 E. & B. 802, at p. 806, "that the person who has possession has the property." In the same case he says (at p. 805): "I am of opinion that the law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for against a wrongdoer possession is title." The law is so stated by the very learned annotator in his note to *Wilbraham v. Snow*, 2 Wms. Saund. 47 f. Therefore it is not open to the defendant, being a wrongdoer, to inquire into the nature or limitation of the possessor's right, and unless it is competent for him to do so the question of his relation to, or liability towards, the true owner cannot come into the discussion at all; and, therefore, as between those two parties full damages have to be paid without any further inquiry. The extent of the liability of the finder to the true owner not being relevant to the discussion between him and the wrongdoer, the facts which would ascertain it would not have been admissible in evidence, and therefore the right of the finder to recover full damages cannot be made to depend upon the extent of his liability over to the true owner. To hold otherwise would, it seems to me, be in effect to permit a wrongdoer to set up a *jus tertii* under which he cannot claim. But, if this be the fact in the case of a finder, why should it not be equally the fact in the case of a bailee? Why, as against a wrongdoer, should the nature of the plaintiff's interest in the thing converted be any more relevant to the inquiry, and therefore admissible in evidence, than in the case of a finder? It seems to me that neither in one case nor the other ought it to be competent for the defendant to go into evidence on that matter.

I think this view is borne out by authority; for instance, in *Burton v. Hughes*, 2 Bing. 173; 27 R. R. 578, the plaintiff, who had borrowed furniture, and was therefore bailee, was held to be entitled to sue in trover wrongdoers who had seized it without giving in evidence the written agreement under which he held it. The point made for the defendant was that "the qualified interest having been obtained under a written agreement could not be proved except by the

production of that agreement duly stamped." The argument on the other side was "that the existence of some kind of interest having been established the precise nature of it or the terms upon which it was acquired were immaterial to the support of this action." BEST, C.J., in delivering judgment says: "If this had been a case between Kitchen and the plaintiff the agreement ought to have been produced, because that alone could decide the respective rights of those two parties; but it appears that Kitchen was to supply the plaintiff with furniture, and the question is whether, after he had obtained it, he had a sufficient interest to maintain this action. The case which has been referred to — *Sutton v. Buck*, 2 Taunt. 302; 11 R. R. 585 — confirms what I had esteemed to be the law upon the subject, namely, that a simple bailee has a sufficient interest to sue in trover." By holding, therefore, that the agreement defining the conditions of the plaintiffs' interest was immaterial the court in effect decided that the right of the bailee, in possession, to sue could not depend upon the fact or extent of his liability over to the bailor, since the plaintiff was allowed to keep his verdict in trover, the agreement defining his interest and liability being excluded from the discussion. In *Sutton v. Buck*, on the authority of which this case was decided, it was held that possession under a general bailment is sufficient title for the plaintiff in trover. The plaintiff had taken possession of a stranded ship under a transfer void for non-compliance with the Register Acts, and he sued the defendant in trover for portions of the timber, wood, and materials of which the defendant had wrongfully taken possession. Sir JAMES MANSFIELD, C.J., had non-suited the plaintiff, on the ground that the transfer was defective without registration. On motion the non-suit was set aside, Sir JAMES MANSFIELD being a member of the court, and a new trial ordered on the ground that the plaintiff had sufficient possession to maintain the action against the wrongdoer. It is true that CHAMBRE, J., reserved his opinion as to the measure of damages, but on the new trial the plaintiff recovered a verdict apparently for the full value of the things converted, and on further motion for a new trial the only point argued was that the defendant was justified as lord of the manor in doing what he did — a contention which was rejected by the court.

In *Swire v. Leach*, 18 C. B. (N.S.) 479, a pawnbroker, whose landlord had wrongfully taken in distress pledges in the custody of the pawnbroker, was held entitled to recover in an action against the landlord for conversion the full value of the pledges. This case was decided by a strong court, consisting of ERLE, C.J., WILLIAMS and KEATING, JJ., and has never, so far as I know, been questioned since. The duty of the bailee to account to the bailor was recognised as well established. See also *Turner v. Hardcastle*, 11 C. B. (N.S.) 683, a considered judgment of the Court of Common Pleas, which

included WILLES, J., who had not been a party to *Swire v. Leach*, and where the bailee's right to recover full damages and his obligation to account to the bailor is again affirmed.

The ground of the decision in *Claridge's Case* was that the plaintiff in that case, being under no liability to his bailor, could recover no damages, and though for the reasons I have already given I think this position is untenable, it is necessary to follow it out a little further. There is no doubt that the reason given in *Heydon and Smith's Case*, 13 Rep. 69 — and itself drawn from the Year Books — has been repeated in many subsequent cases. The words are these: "Clearly, the bailee, or he who hath a special property, shall have a general action of trespass against a stranger, and shall recover all in damages because that he is chargeable over."

It is now well established that the bailee is accountable, as stated in the passage cited and repeated in many subsequent cases. But whether the obligation to account was a condition of his right to sue, or only an incident arising upon his recovery of damages, is a very different question, though it was easy to confound one view with the other.

HOLMES C.J., in his admirable lectures on the Common Law, in the chapter devoted to bailments, traces the origin of the bailee's right to sue and recover the whole value of chattels converted, and arrives at the clear conclusion that the bailee's obligation to account arose from the fact that he was originally the only person who could sue, though afterwards by an extension, not perhaps quite logical, the right to sue was conceded to the bailor also. He says at p. 167: "At first the bailee was answerable to the owner because he was the only person who could sue; now it was said he could sue because he was answerable to the owner." And again at p. 170: "The inverted explanation of Beaumanoir will be remembered, that the bailee could sue because he was answerable over, in place of the original rule that he was answerable over so strictly because only he could sue." This inversion, as he points out, is traceable through the Year Books, and has survived into modern times, though, as he shews, it has not been acted upon. Pollock and Maitland's *History of English Law*, vol. 2, p. 170, puts the position thus: — "Perhaps we come nearest to historical truth if we say that between the two old rules there was no logical priority. The bailee had the action because he was liable, and was liable because he had the action." It may be that in early times the obligation of the bailee to the bailor was absolute, that is to say, he was an insurer. But long after the decision of *Coggs v. Bernard*, [1704] 2 Ld. Raym. 909, which classified the obligations of bailees, the bailee has, nevertheless, been allowed to recover full damages against a wrongdoer, where the facts would have afforded a complete answer for him against his bailor. The cases above cited are instances of this. In each of them the bailee would

have had a good answer to an action by his bailor; for in none of them was it suggested that the act of the wrongdoer was traceable to negligence on the part of the bailee. I think, therefore, that the statement drawn, as I have said, from the Year Books may be explained, as HOLMES, C.J., explains it, but whether that be the true view of it or not, it is clear that it has not been treated as law in our courts. Upon this, before the decision in *Claridge's Case*, there was a strong body of opinion in text-books, English and American, in favour of the bailee's unqualified right to sue the wrongdoer: see Mayne on Damages, 4th ed. p. 381, and cases there cited; Sedgwick on Damages, 7th ed. vol. 1, p. 61, n. (a); Story on Bailments, 9th ed. s. 352; Kent's Commentaries, 12th ed. vol. 2, p. 568, n. (e); Pollock on Torts, 6th ed. pp. 354, 355; Addison on Torts, 7th ed. p. 523; and as I have already pointed out, Williams, J., the editor of Williams' Saunders, was a party to the decision of *Swire v. Leach*, 18 C. B. (N.S.) 479. [See also Mr. Justice Wright in Pollock and Wright on Possession, p. 166.] The bailee's right to recover has been affirmed in several American cases entirely without reference to the extent of the bailee's liability to the bailor for the tort, though his obligation to account is admitted — see them referred to in the passages cited, and in particular see *Ullman v. Barnard*, [1856] 73 Mass. Rep. 554; *Parish v. Wheeler*, [1860] 22 New York Rep. 494; *White v. Webb*, 15 Conn. Rep. 302. The case of *Rooth v. Wilson*, 1 B. & A. 59, is a clear authority that the right of the bailee in possession to recover against a wrongdoer is the same in an action on the case as in an action of trover, if indeed authority were required for what seems obvious in point of principle. There the gratuitous bailee of a horse was held entitled to recover the full value of the horse in an action on the case against a defendant by whose negligence the horse fell and was killed. The case was decided by Lord ELLENBOROUGH, C.J., BAYLEY, ABBOTT, and HOLROYD, JJ. The three latter seem to me to put it wholly on the ground that the plaintiff was in possession and the defendant a wrongdoer. ABBOTT, J., says shortly: "I think that the same possession which would enable the plaintiff to maintain trespass would enable him to maintain this action"; and BAYLEY, J., points out that case is a possessory action. But Lord ELLENBOROUGH undoubtedly rests his judgment on the view that the plaintiff would himself have been responsible in damages to his bailor to a commensurate amount. This, no doubt, was his personal view, but it was not the decision of the court, and, as I have pointed out, it has certainly not been acted upon in subsequent cases. Therefore, as I said at the outset, and as I think I have now shewn by authority, the root principle of the whole discussion is that, as against a wrongdoer, possession is title. The chattel that has been converted or damaged is deemed to be the chattel of the possessor and of no other, and therefore its loss or deterioration is his loss, and to him,



if he demands it, it must be recouped. His obligation to account to the bailor is really not *ad rem* in the discussion. It only comes in after he has carried his legal position to its logical consequence against a wrongdoer, and serves to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed. There is no inconsistency between the two positions; the one is the complement of the other. 'As between bailee and stranger, possession gives title — that is, not a limited interest, but absolute and complete ownership, and he is entitled to receive back a complete equivalent for the whole loss or deterioration of the thing itself. As between bailor and bailee the real interests of each must be inquired into, and, as the bailee has to account for the thing bailed, so he must account for that which has become its equivalent and now represents it. What he has received above his own interest he has received to the use of his bailor. The wrongdoer, having once paid full damages to the bailee, has an answer to any action by the bailor. See *Com. Dig. Trespass B. 4*, citing *Roll. 551*, l. 31, 569, l. 22, *Story on Bailments*, 9th ed. s. 352, and the numerous authorities there cited.

The liability by the bailee to account is also well established — see the passage from Lord Coke, and the cases cited in the earlier part of this judgment — and therefore it seems to me that there is no such preponderance of convenience in favour of limiting the right of the bailee as to make it desirable, much less obligatory, upon us to modify the law as it rested upon the authorities antecedent to *Claridge's Case*. I am aware that in two able text-books, *Beven's Negligence in Law and Clerk and Lindsell on Torts*, the decision in *Claridge's Case* is approved, though it is there pointed out that the authorities bearing the other way were not fully considered. The reasons, however, which they give for their opinions seem to be largely based upon the supposed inconvenience of the opposite view; nor are the arguments by which they distinguish the position of bailees from that of other possessors to my mind satisfactory. *Claridge's Case* was treated as open to question by the late Master of the Rolls in *Meux v. Great Eastern Ry. Co.*, [1895] 2 Q. B. 387, and, with the greatest deference to the eminent judges who decided it, it seems to me that it cannot be supported. It seems to have been argued before them upon very scanty materials. Before us the whole subject has been elaborately discussed, and all, or nearly all, the authorities brought before us in historical sequence.

*Appeal allowed.*

STIRLING and MATHEW, L.JJ., concurred.

## CHAMBERLAIN v. WEST.

37 Minn. 54. 1887.

MITCHELL, J. This action was brought to recover the value of a diamond scarf-pin, alleged to have been stolen from plaintiff's room while a guest at the West Hotel. It appeared from the evidence that the plaintiff was not the general owner of the pin, but that a year or two previous he had borrowed it from a friend, who, he says, "loaned it to him for ten years." The plaintiff had a verdict for the full value of the property. The defendant's contention is — *First*, that plaintiff, being a mere gratuitous bailee, had no such interest in the property as would entitle him to recover; and, *second*, even if he could maintain an action, he could only recover the value of his special property in the thing.

Nothing is better settled than that, in actions for torts in the taking or conversion of personal property against a stranger to the title, a bailee, mortgagee, or other special-property man is entitled to recover full value, and must account to the general owner for the surplus recovered beyond the value of his own interest; but as against the general owner or one in privity with him he can only recover the value of his special property. 1 Sedg. Dam. note a; 1 Suth. Dam. 210; *Jellett v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265 (15 N. W. Rep. 237); *Russell v. Butterfield*, 21 Wend. 300; *Mechanics', etc., Bank v. National Bank*, 60 N.Y. 40; *Atkins v. Moore*, 82 Ill. 240; *Fallon v. Manning*, 35 Mo. 271. A mere depositary or gratuitous bailee may maintain such an action. The bailee may maintain it, although not responsible to the general owner for the loss. This he may do, not only against one who has tortiously converted the property, but also against one through whose negligence or failure of duty it has been lost; as, for example, a common carrier or innkeeper. *Edw. Bailm.* § 37; *Faulkner v. Brown*, 13 Wend. 63; *Moran v. Portland Steam Packet Co.*, 35 Me. 55; *Finn v. Western R. Co.*, 112 Mass. 524; *Kellogg v. Sweeney*, 1 Lans. 397, 46 N.Y. 291.

NOTE. — See also *White v. Webb*, 15 Conn. 302; *Benjamin v. Strengle*, 13 Ill. 466; *American District Telegraph Co. v. Walker*, 72 Md. 454, 463; *Johnson v. Holyoke*, 105 Mass. 80; *Mizner v. Frazier*, 40 Mich. 592; *Lyle v. Barker*, 5 Binn. (Pa.) 457.

It has frequently been said that a bailee may recover the entire damage done to a bailed chattel, and that such recovery bars any suit by the bailor. *Story, Bailments*, § 94; *Nicolls v. Bastard*, 2 Crompt. M. & R. 659, 660; *Knight v. Davis Carriage Co.*, 71 Fed. 662, 668; *Harrington v. King*, 121 Mass. 269; *Woodman v. Nottingham*, 49 N.H. 387.

But more cautious statements have been made. In *Gillette v. Good-*

speed, 69 Conn. 363, the court said (p. 370): "If goods in the hands of a bailee are lost by the wrongful act of the third party, the latter is liable to him for their full value, unless the owner interposes by a suit for his own protection." In *Johnson v. Holyoke*, 105 Mass. 80, the court said: "A hirer or other bailee of chattels is entitled, by virtue of his possession, to maintain an action of tort for any injury to them. In such an action, brought with the express or implied consent of the general owner, full damages for the injury to the property may be recovered, and a judgment therein may be pleaded in bar of any like action, afterwards brought either by the bailor or by the bailee." In *Finn v. Western Railroad Corporation*, 112 Mass. 524, the court said (p. 534), that it was to be presumed from the facts that the bailor had acquiesced in the recovery by the bailee, and "if there were any doubt upon this point, we might order a new trial upon the question of damages only."

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### WHITE v. ALLEN.

133 Mass. 423. 1882.

TORT for the conversion of fifty hides of leather, with a count in contract for money had and received. The case was submitted to the Superior Court upon agreed facts, in substance as follows:

Charles Byrt died intestate on March 25, 1881, and the plaintiff was appointed administrator of his estate on October 4, 1881. The defendant is the surviving partner of the firm of T. H. Allen & Brother.

The plaintiff's intestate was a tanner and currier, and, in February 1881, the defendant's firm sent to him fifty hides to be by him tanned, curried and sold, and, out of the proceeds derived from the sale of the hides he was to pay the firm the sum at which they were charged to him, namely, \$117.61, and to retain the balance of the proceeds of such sale for his labor and for selling the same. It was stipulated that, until thus tanned, curried and paid for, the title to the hides should remain in the firm. The process of tanning and currying was not quite completed when the plaintiff's intestate died, and, within two days after his death, the defendant's firm took possession of the hides and finished and completed this process. Five days after his death they sold the hides for \$132.81; and this was their value when the firm took possession of and sold them. In order to prevent damage to the hides, it was necessary to complete this process of tanning and currying without delay. The authority of the plaintiff's intestate to tan, curry and sell these hides was never revoked during his life by the defendant's firm, and he was never paid for performing this service.

If, upon the above facts, the plaintiff could recover, judgment was

to be entered for him for such sum as he was entitled to recover; otherwise, judgment for the defendant.

BACON, J., found that the plaintiff was entitled to recover \$132.81, and ordered judgment for him for that amount; and the defendant appealed to this court.

DEVENS, J. The contract between the plaintiff's intestate and the defendant's firm is not to be deemed one so personal in its character that it was determined by the death of the intestate. It could have been completed by the administrator, by finishing the tanning and currying and selling the skins, belonging to the firm, upon the terms agreed. The work having been in fact completed by the firm and the skins sold, the question is as to the damages that the plaintiff may recover. Where one has a special property in a chattel, or a lien thereon, he may in some instances recover its full value against a wrongdoer who appropriates it; but as in such case he recovers all that exceeds his own special property or interest therein, for the benefit of the general owner, when the wrongdoer is not a third person, but the general owner himself, his rights are fully maintained, and circuity of action is avoided, by permitting him to recover the value or amount of his special property or interest alone. He is thus fully indemnified, the balance of the value is with those entitled to it, and the whole controversy is thus settled in a single suit.

The court directed that the damages should be reduced to \$15.20.

NOTE. — See *accord*, *Brierly v. Kendall*, 17 Q. B. 937; *Benjamin v. Stremple*, 13 Ill. 466.

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### WILBRAHAM v. SNOW.

2 Saunders, 46. 1669.

TROVER, upon special verdict; the case was this; the plaintiff, being sheriff, seized goods in execution by virtue of the writ of *fiery facias*; and afterwards, and before they were sold, the defendant took and carried them away, and converted them to his own use; for which the plaintiff brought his action. And on the first argument it was adjudged that the action well lies; and that the plaintiff, being sheriff, has such a property in the goods, by seizing them in execution, that he may maintain an action of trespass or trover at his election; and judgment was given for the plaintiff *nisi*, etc., but it was not moved afterwards.

NOTE. — See, *accord*, *Gibbs v. Chase*, 10 Mass. 125.

A sheriff may bail the chattel to another for safekeeping, and such receiptor may maintain trover if the chattel is taken out of his possession by a third person. *Poole v. Symonds*, 1 N.H. 289; *Robinson v. Besarick*, 156 Mass. 141, 144.

## SECTION 2.

## RIGHTS OF A FINDER.

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ARMORY *v.* DELAMIRIE.

1 Strange, 505. 1722.

THE plaintiff being a chimney sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who under pretense of weighing it, took out the stones, and calling to the master to let him know it came to three halfpence, the master offered the boy the money, who refused to take it, and insisted to have the thing again; whereupon the apprentice delivered him back the socket without the stones. And now in trover against the master these points were ruled: —

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. . . .

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LAWRENCE *v.* BUCK.

62 Me. 275. 1874.

## ON REPORT.

REPLEVIN of a chain cable, to which both parties claimed the title by having found it in the Kennebec River, near the dam, in July, 1870. When the plaintiffs discovered it, the chain lay coiled up in a little pile near a place which is dry when the dam is out, as it then was, the end of the cable running off toward the dam, in water about a foot or eighteen inches deep. They hauled out about sixty feet of the chain upon some logs that were grounded and out of water there, the end being fast under water. As it was then growing dark they left for the night, and when they returned for it the next morning it had been removed by the defendants, who claimed that they found the chain and coiled it up, in the manner before described, having dragged it into shoal water for that purpose, and unfastened the end that was round a cedar buoy in the dam, several days before the plaintiffs saw it; that while the defendants were trying to remove the gravel in which a portion of the chain was imbedded, they were

called away to their work on the railroad bridge. Soon after, they borrowed a rope and blocks at the railroad shop and went to draw out the chain. They found that in the mean time, somebody had taken out of the water the end they had coiled up, and drawn it out upon the logs. The defendants attached their tackle, drew out the chain, and carried it to the railroad shop, where it was when replevied.

DANFORTH, J. This action is replevin of a chain cable which the evidence shows to have been lost by the original owners. Such property belongs to the first finder as against all persons but the loser. The testimony in this case clearly shows that the defendants were the first finders, and (if it were necessary) that, before the finding of the plaintiffs, they had taken possession by such acts of ownership as the nature and condition of the property, under the circumstances, allowed; and further, that from the first they had no intention to abandon. It further appears that the first complete possession by entire removal from the place where the property was found was in the defendants.

There is no testimony in the case upon which to base judgment for damages occasioned by its detention, and only nominal damages can be awarded, and an order that the cable be restored to the defendants.

*Judgment for a return.*

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CLARK v. MALONEY.

3 HARR. (Del.) 68. 1839.

ACTION of trover to recover the value of ten white pine logs. The logs in question were found by plaintiff floating in the Delaware Bay after a great freshet, were taken up and moored with ropes in the mouth of Mispillion Creek. They were afterwards in the possession of defendants, who refused to give them up, alleging that they had found them adrift and floating up the creek.

BAYARD, Chief Justice, charged the jury: The plaintiff must show *first*, that the logs were his property; and *secondly*, that they were converted by the defendants to their own use. In support of his right of property, the plaintiff relies upon the fact of his possession of the logs. They were taken up by him, adrift in the Delaware Bay, and secured by a stake at the mouth of Mispillion Creek. Possession is certainly *prima facie* evidence of property. It is called *prima facie* evidence because it may be rebutted by evidence of better title, but in the absence of better title it is as effective a support of title as the most conclusive evidence could be. It is for this reason, that *the finder of a chattel, though he does not acquire an absolute property in it, yet has such a property as will enable him to keep it against all but the*

*rightful owner.* The defense consists, not in showing that the defendants are the rightful owners, or claim under the rightful owner; but that the logs were found by them adrift in Mispillion Creek, having been loosened from their fastening either by accident or design, and they insist that their title is as good as that of the plaintiff. But it is a well-settled rule of law that the loss of a chattel does not change the right of property; and for the same reason that the original loss of these logs by the rightful owner did not change his absolute property in them, but he might have maintained trover against the plaintiff upon refusal to deliver them, so the subsequent loss did not divest the *special* property of the plaintiff. It follows, therefore, that as the plaintiff has shown a special property in these logs, which he never abandoned, and which enabled him to keep them against all the world but the rightful owner, he is entitled to a verdict.

*Verdict for the plaintiff.*

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ELWES v. BRIGG GAS COMPANY.

L. R. 33 Chan. Div. 562. 1886.

By lease, dated the 7th of December, 1885, the plaintiff, V. D. H. Cary Elwes, who was lord of the manor of Brigg, and tenant for life in possession of the Elwes family estates, in exercise of the power limited to him by a settlement of the 5th of April, 1856, appointed and demised unto the Brigg Gas Company a piece of land in Brigg, forming part of the Elwes estates, for a term of ninety-nine years, at a yearly rent of £4 11s. 4d., reserving unto the lessor and his assigns, and to the person or persons for the time being entitled under the said settlement to the Elwes estates in remainder or reversion expectant on the death of the lessor, "all mines and minerals, and all watercourses which now are or during the term hereby granted shall be upon or under the said piece of land and premises, with liberty to enter thereon respectively from time to time for the purpose of opening, cleansing, and repairing such watercourses." The lease contained a covenant by the lessee company to erect a boundary wall, and that the gas holders, gas tanks, erections, sheds, and buildings of every description which might be erected and set up on the demised premises should be made under the inspection and to the satisfaction of the surveyor or agent for the time being of the lessor, and according to plans and specifications to be previously approved in writing by him; and that they would erect and set up every such gas holder, etc., with the best bricks, timber, and other materials as should from time to time be approved and sanctioned by such surveyor or agent of the lessor.

And the lessor thereby covenanted with the lessees, their successors and assigns, that on their paying the yearly rent thereby reserved, and observing and performing the covenants by them therein contained, they should hold and enjoy the premises and all buildings to be erected thereon during the term of ninety-nine years without any interruption by the lessor or any person or persons claiming under him or under the settlement, with a proviso that at the expiration or sooner determination of the term thereby granted the lessees or their assigns might take down and remove all trade fixtures, implements, and things in or about the demised premises, but not the boundary wall, erections, sheds, and buildings, all of which would form the property of the lessor, with an option to the lessor to take the trade fixtures at a valuation.

In April, 1886, the defendant company, in the course of their excavations for the purpose of erecting a gas holder on the demised land, discovered embedded in the clay, some feet below the surface, and within a few yards of the river Ancholme, an ancient prehistoric ship or boat about forty-five feet long, and apparently hollowed out of a large oak tree.

On the 1st of May the plaintiff caused a notice to be served upon the clerk of the defendant company claiming the boat and requiring it to be delivered up.

The defendant company declined to comply with the plaintiff's demand and asserted that the boat belonged to them.

To determine this question the present action was brought.

CHITTY, J. — The facts are not in dispute. The boat is very ancient; the parties to the action concur in the statement, more or less conjectural, that it is some two thousand years old, and that having been abandoned or left derelict by its original owners on what is now the bank of the river Ancholme, it became by the operation of natural causes, such as by sinking in the ooze and the deposit of alluvial soil, buried in the earth; and so it remained for many centuries, until it was recently discovered and excavated by the defendants. When discovered it was lying embedded in the clay at a depth from the surface of four feet at one end and six feet at the other; and now that it is brought to the surface it appears to be a boat of rude construction, forty-five feet in length, hollowed out of a single oak tree. The wood has not become petrified or fossilized, but retains the properties of wood.

A discussion took place at the bar whether the boat, just previously to its discovery, ought in point of law to be considered as a mineral, or as part of the soil in which it was embedded, or as still retaining the character of a chattel. It was one or other of these three things. In my opinion, for the reasons subsequently to be given, it is not necessary to decide which it was. In support of the contention that it was a mineral, reference was made to the case of



*Hext v. Gill*, Law Rep. 7 Ch. 699, and to the statement in the judgment of Lord Justice MELLISH (with which Lord Justice JAMES concurred), that the term "minerals" includes every substance which can be got from underneath the earth for the purpose of profit. The terms of this definition are wide enough to include the boat; but I am not aware that the term "minerals" has ever been held to include anything except that which is part of the natural soil. Unquestionably coal is deemed in law a part of the natural soil, without regard to what geologists may shew to have been its origin. In law the natural processes by which the trees of a forest have become coal are not investigated: the result only is considered. But the boat has not become petrified or fossilized; it always has been distinguishable from the natural soil itself. If, therefore, I were required to decide the question, I should hold that it is not a mineral. In support of the contention that it ought to be deemed in law as part of the soil in which it was embedded, reference was made to the principle embodied in the maxim, "*Quicquid plantatur*," or as it is sometimes stated (see Broom's Legal Maxims, 6th ed. p. 376, n., and the judgment in *Climie v. Wood*, Law Rep. 3 Ex. 257, 260), "*fixatur solo, solo cedit*." This principle is an absolute rule of law, not depending on intention; for instance, if a man digs in the land of another, and permanently fixes in the soil stones or bricks, or the like, as the foundation of a house, the stones or bricks become the property of the owner of the soil, whatever may have been the intention of the person who so placed them there, and even against his declared intention that they should remain his property. Nor does it appear to me to be material that the things should have been placed there by the hand of man; it would seem to be sufficient if they have become permanently fixed in the soil by the operation of natural causes. In support of the contention that the boat always remained a chattel, it was or may be urged that, though embedded in the soil, it always was distinguishable from the soil itself, and preserved its original character of a chattel, which it certainly now is. Not long ago there was discovered, in the course of making excavations in Hampshire, a jar containing Roman coins — not gold or silver coins, and therefore not falling within the royal prerogative of treasure trove: apparently the coins formed the small change of the treasure of a Roman legion. Could it be said that the jar or the coins were part of the soil within the principle referred to? Similarly a short time since there was found beneath the soil (I believe in Devonshire) a Roman lamp of ingenious construction made of lead, and in an excellent state of preservation: a similar question may be asked of the lamp. But, as I have said, it is not necessary to decide these or the like interesting questions in the present case.

The first question which does actually arise in this case is whether the boat belonged to the plaintiff at the time of the granting of the

lease. I hold that it did, whether it ought to be regarded as a mineral, or as part of the soil within the maxim above cited, or as a chattel. If it was a mineral or part of the soil in the sense above indicated, then it clearly belonged to the owners of the inheritance as part of the inheritance itself. But if it ought to be regarded as a chattel, I hold the property in the chattel was vested in the plaintiff, for the following reasons. Being entitled to the inheritance under the settlement of 1856 and in lawful possession, he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat. The principle of the decision of the court in *Reg. v. Rowe*, Bell's C. C. 93, appears to me to apply. There the question was whether the property in some iron lying at the bottom of a canal was well laid in the indictment in the canal company. The water had been taken out for the purpose of cleaning the canal, and the prisoner was indicted for stealing the iron which had been dropped into the canal by the owner. The court held that the canal company had a sufficient property in and possession of the iron to support the indictment. If the fact of the iron having been left on the surface of the ground covered by water was sufficient to give in law possession of the chattel to the person in possession of the land, it appears to follow *a fortiori* that the facts of this case justify me in holding that the plaintiff was in possession of the boat. For the boat was embedded in the land; a mere trespasser could not have taken possession of it, he could only have come at it by further acts of trespass involving spoil and waste of the inheritance: *Blades v. Higgs*, 13 C. B. (N.S.) 844; 11 H. L. C. 621, and Holmes' The Common Law, title "Possession," page 223. The plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established; it had for centuries been lost or barred, even supposing that the property had not been abandoned when the boat was first left on the spot where it was found. The plaintiff, then, had a lawful possession, good against all the world, and therefore the property in the boat. In my opinion it makes no difference, in these circumstances, that the plaintiff was not aware of the existence of the boat.

The defendants' claim must then rest on the lease, and what has been done or what has occurred since it was granted, including the finding of the boat.

The boat did not pass to them by the mere demise; a lease being only a contract for the possession and profits of the land: *Bac. Abr. tit. Leases and Terms for Years*, vol. iv, p. 632. By the lease the defendants covenant to build a wall round the demised property, but they do not covenant to construct a gas holder. The construction of such a work is, however, contemplated by the lease. The covenant by the lessees in regard to the gas holder is ungrammati-

cally expressed, but the substance of it is clear. It is a covenant to the effect that any gas holder which they may construct shall be in accordance with plans previously approved of on behalf of the lessor. Plans were accordingly submitted and approved. These plans involved the excavation of the ground where the boat lay embedded, and to a depth below the bottom of the boat. The defendants discovered the boat in making these excavations pursuant to the plans. The lease did not give any license to make the excavations, but the approval of the plans was equivalent in law to a license to make the excavations. The plans, however, are silent as to what is to be done with the soil excavated. In the circumstances some permission ought to be implied as to the removal and disposal of what might be excavated. The question is as to the extent of this implied permission. As against the lessors the permission ought not to be carried beyond what may be reasonably inferred to have been the intention of the parties. The excavations were to be made to a depth of fifteen feet; obviously it was not the intention of the parties that the soil excavated should be piled up on other parts of the small plot of ground comprised in the lease. The implied permission to remove and dispose ought then to extend to what the parties might fairly be deemed to have contemplated would be found in making the excavations; but beyond this point it ought not to be carried. The existence of the boat was unknown and its discovery was not contemplated. In my opinion, then, the license to remove and dispose extended to the clay and ordinary soil likely to be found in pursuing the license to excavate, but it did not extend to what was unknown and not contemplated, and therefore did not comprise the boat. If the boat ought to be considered as a mineral (which I think it was not), then it fell within the express exception of minerals contained in the lease; against this express exception no implication ought to be raised. If, however, the boat ought to be considered as part of the soil by reason of its having become permanently affixed to it, or if it ought to be considered as a chattel, it would be unreasonable to infer that it was intended to be included. Further, if it ought to be regarded as a chattel, the defendants did not acquire any property in the chattel by the mere finding as against the plaintiff, who upon the grounds already stated was the owner of the chattel.

For these reasons I hold that the plaintiff is entitled to the boat.

The defendants were accordingly ordered to deliver the boat to the plaintiff, and to pay the costs of the action.

NOTE. — In *Goddard v. Winchell*, 86 Iowa, 71, the court held that an aerolite belonged to the owner of the land upon which it fell, and not to the person who discovered it. See, *accord*, *Oregon Iron Co. v. Hughes*, 47 Oreg. 313.

## BRIDGES v. HAWKESWORTH.

21 L. J., Q. B. 75. 1852.

THIS was an appeal brought by the plaintiff from the Westminster County Court.

The plaintiff was a traveller for a large firm with which the defendant, who was a shopkeeper, had dealings. On one occasion (October, 1847) the plaintiff, who had called at the defendant's on business, on leaving the defendant's shop noticed and picked up a small parcel which was lying on the shop floor. He immediately shewed it to the shopman, and on opening it found it contained bank notes to the value of 55*l*. The plaintiff told the defendant who came in that he had found a parcel of notes, and requested the defendant to keep them to deliver to the owner. The defendant advertised the finding of them in the newspapers, stating that they should be restored to the owner on his properly describing them and paying the expenses. Three years having elapsed and no owner appearing to claim them, the plaintiff applied to the defendant for them, offering to pay the expense of the advertisements, and to indemnify the defendant against any claim in respect to them. The defendant refused to deliver them up, and the plaintiff consequently brought a plaint in the County Court of Westminster to recover the notes. The Judge decided that the defendant was entitled to keep them as against the plaintiff, and gave judgment for the defendant. It was found in the case that the plaintiff when he handed the notes over to the defendant to deliver to the true owner, did not intend to give up any title to them that he might possess.

Judgment was now delivered by —

PATTESON, J. — The notes which are the subject of this action were evidently dropped by mere accident in the shop of the defendant by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been at all put upon that ground. The plaintiff found them on the floor, they being manifestly lost by some one. The general right of the finder to any article which has been lost as against all the world except the true owner, was established in the case of *Armory v. Delamirie*, which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant; and if he once had the right, the case finds that he did not intend by delivering the notes to the defendant to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner should he appear. Nothing that was done afterwards has altered this state of things; the advertisements indeed in the newspapers referring to the defendant had the same object:

the plaintiff has tendered the expense of those advertisements to the defendant, and offered him an indemnity against any claim to be made by the real owner, and has demanded the notes. The case, therefore, resolves itself into the single point, on which it appears that the learned Judge decided it: namely, whether the circumstance of the notes being found *inside* the defendant's shop, gives him, the defendant, the right to have them as against the plaintiff who found them. There is no authority to be found in our law directly in point. Perhaps the nearest case is that of *Merry v. Green*, but it differs in many respects from the present. We were referred in the course of the argument to the learned work of Von Savigny, edited by Chief Justice PERRY, but even this work, full as it is of subtle distinctions and nice reasonings, does not afford a solution of the present question. It was well asked on the argument, if the defendant has the right, when did it accrue to him? If at all, it must have been antecedent to the finding by the plaintiff, for that finding could not give the defendant any right. If the notes had been accidentally kicked into the street, and then found by some one passing by, could it be contended that the defendant was entitled to them, from the mere fact of their having been originally dropped in his shop? If the discovery had not been communicated to the defendant, could the real owner have had any cause of action against him, because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house before they were found, as they would have been had they been intentionally deposited there, and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. These steps were really taken by the defendant as the agent of the plaintiff, and he has been offered an indemnity, the sufficiency of which is not disputed. We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all parties except the real owner; and we think that rule must prevail, and that the learned Judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment therefore is, that the plaintiff is entitled to these notes as against the defendant, and that the judgment of the court below must be reversed, and judgment given for the plaintiff for 50*l*. The plaintiff to have the costs of the appeal.

*Judgment reversed.*

## SOUTH STAFFORDSHIRE WATER CO. v. SHARMAN.

[1896.] 2 Q. B. D. 44.

APPEAL from the decision of the county court of Staffordshire holden at Lichfield.

Under a conveyance dated January 6, 1872, from the mayor, aldermen, and citizens of the city of Lichfield, the plaintiffs were the owners in fee simple in possession of the land covered by the Minster Pool in that city.

In August, 1895, the plaintiffs employed the defendant, together with a number of other workmen, to clean out the pool. During the operation several articles of interest were found, and the defendant, while so employed, found in the mud at the bottom of the pool two gold rings. The plaintiffs demanded the rings; but he refused to deliver them up, and placed them in the hands of the police authorities, who, by advertisement and otherwise, endeavoured to find the owner of the rings. Ultimately, being unsuccessful in finding the real owner, the police authorities returned the rings to the defendant.

The plaintiffs then sued the defendant in detinue for the recovery of the rings.

It was proved at the trial that there was no special contract between the plaintiffs and the defendant as to giving up any articles that might be found.

The county court judge gave judgment for the defendant, holding, on the authority of *Armory v. Delamirie*, 1 Str. 505, and *Bridges v. Hawkesworth*, 21 L. J. (Q. B.), 75, that the defendant had a good title against all the world except the real owner.

The plaintiffs appealed.

LORD RUSSELL of KILLOWEN, C.J. In my opinion, the county court judge was wrong, and his decision must be reversed and judgment entered for the plaintiffs. The case raises an interesting question. The action was brought in detinue to recover the possession of two gold rings from the defendant. The defendant did not deny that he had possession of the rings, but he denied the plaintiffs' title to recover them from him. Under those circumstances the burden of proof is cast upon the plaintiffs to make out that they have, as against the defendant, the right to the possession of the rings.

Now, the plaintiffs, under a conveyance from the corporation of Lichfield, are the owners in fee simple of some land on which is situate a pool known as the Minster Pool. For purposes of their own the plaintiffs employed the defendant, among others, to clean out that pool. In the course of that operation several articles of interest were found, and amongst others the two gold rings in question

were found by the defendant in the mud at the bottom of the pool.

The plaintiffs are the freeholders of the *locus in quo*, and as such they have the right to forbid anybody coming on their land or in any way interfering with it. They had the right to say that their pool should be cleaned out in any way that they thought fit, and to direct what should be done with anything found in the pool in the course of such cleaning out. It is no doubt right, as the counsel for the defendant contended, to say that the plaintiffs must shew that they had actual control over the *locus in quo* and the things in it; but under the circumstances, can it be said that the Minster Pool and whatever might be in that pool were not under the control of the plaintiffs? In my opinion, they were. The case is like the case, of which several illustrations were put in the course of the argument, where an article is found on private property, although the owners of that property are ignorant that it is there. The principle on which this case must be decided, and the distinction which must be drawn between this case and that of *Bridges v. Hawkesworth*, 21 L. J. (Q. B.), 75, is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41: "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference."

That is the ground on which I prefer to base my judgment. There is a broad distinction between this case and those cited from Blackstone. Those were cases in which a thing was cast into a public place or into the sea — into a place, in fact, of which it could not be said that any one had a real *de facto* possession, or a general power and intent to exclude unauthorized interference.

The case of *Bridges v. Hawkesworth* stands by itself, and on special grounds; and on those grounds it seems to me that the decision in that case was right. Some one had accidentally dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the ground of the decision being, as was pointed out by PATTESON, J., that the

notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper, or "within the protection of his house."

It is somewhat strange that there is no more direct authority on the question; but the general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the locus in quo.

WILLS, J. I entirely agree; and I will only add that a contrary decision would, as I think, be a great and most unwise encouragement to dishonesty.

*Appeal allowed ; judgment for plaintiffs.*

**NOTE.** — See the report of *M'Dowell v. Ulster Bank*, in 33 Irish Law Times, 225 (1899). The plaintiff, as porter to the defendant, was sweeping out the bank after four o'clock in the afternoon, subsequent to the time at which the bank was open for the purposes of exchange, and at a time when the public had no admittance to it. He found under one of the tables used by persons signing checks a parcel containing £25 in notes. He handed them over to the manager of the bank, telling him how he had found them, and asking him to try and find the owner. The owner was not found, and the plaintiff claimed the notes. The court decided for the defendant, saying: "I do not decide this case on the ground laid down by Lord RUSSELL in *Sharman's Case*. I decide it on the ground of the relation of master and servant, and that it was by reason of the existence of that relationship and in the performance of the duties of that service that the plaintiff acquired possession of this property. I conceive that it is the duty of the porter of the bank, who acts as caretaker, to pick up matters of this description, and to hand them over to the bank. I hold that the possession of the servant of the bank was the possession of the bank itself, and that, therefore, the element is wanting which would give the title to the servant as against the master. He relies as against his master on the possession. In this case it was the possession of the bank, and the servant held the notes as servant."

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BARKER v. BATES.

13 Pick. (Mass.) 255. 1832.

**TRESPASS.** The stick in question was thrown out of the sea upon the plaintiff's land, and the defendants took it and carried it away and converted it to their own use.



SHAW, C.J., delivered the opinion of the court. The sole and single question in the present case is, which of these parties has the preferable claim, by mere naked possession, without other title, to a stick of timber, driven ashore under such circumstances as lead to a belief that it was thrown overboard or washed out of some vessel in distress, and never reclaimed by the owner. It does not involve any question of the right of the original owner to regain his property, in the timber, with or without salvage, or the right of the sovereign to claim title to property as wreck, or of the power and jurisdiction of the governments, either of the commonwealth or of the United States, to pass such laws and adopt such regulations on the subject of wreck, as justice and public policy may require.

In considering this question of the relative right of possession, a preliminary one has been discussed, which is, whether the plaintiff had title to the land upon which the stick of timber was found. . . .

Considering it as thus established, that the place upon which this timber was thrown up and had lodged, was the soil and freehold of the plaintiff, that the defendants cannot justify their entry, for the purpose of taking away or marking the timber, we are of opinion that such entry was a trespass, and that as between the plaintiff and the defendants, neither of whom had or claimed any title except by mere possession, the plaintiff had, in virtue of his title to the soil, the preferable right of possession, and therefore that the plaintiff has a right to recover the agreed value of the timber, in his claim of damages.

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DURFEE v. JONES.

11 R.I. 588. 1877.

ASSUMPSIT, heard by the court, jury trial being waived.

DURFEE, C. J. The facts in this case are briefly these: In April 1874, the plaintiff bought an old safe and soon afterwards instructed his agent to sell it again. The agent offered to sell it to the defendant for ten dollars, but the defendant refused to buy it. The agent then left it with the defendant, who was a blacksmith, at his shop for sale for ten dollars, authorizing him to keep his books in it until it was sold or reclaimed. The safe was old-fashioned, of sheet iron, about three feet square, having a few pigeon-holes and a place for books, and back of the place for books a large crack in the lining. The defendant shortly after the safe was left, upon examining it, found secreted between the sheet-iron exterior and the wooden lining a roll of bills amounting to \$165, of the denomination of the national bank bills which have been current for the last ten or twelve years. Neither the plaintiff nor the defendant knew the money was there before it was

found. The owner of the money is still unknown. The defendant informed the plaintiff's agent that he had found it, and offered it to him for the plaintiff; but the agent declined it, stating that it did not belong to either himself or the plaintiff, and advised the defendant to deposit it where it would be drawing interest until the rightful owner appeared. The plaintiff was then out of the city. Upon his return, being informed of the finding, he immediately called on the defendant and asked for the money, but the defendant refused to give it to him. He then, after taking advice, demanded the return of the safe and its contents, precisely as they existed when placed in the defendant's hands. The defendant promptly gave up the safe, but retained the money. The plaintiff brings this action to recover it or its equivalent.

The plaintiff does not claim that he acquired, by purchasing the safe, any right to the money in the safe as against the owner; for he bought the safe alone, not the safe and its contents. See *Merry v. Green*, 7 M. & W. 623. But he claims that as between himself and the defendant his is the better right. The defendant, however, has the possession, and therefore it is for the plaintiff, in order to succeed in his action, to prove his better right.

The plaintiff claims that he is entitled to have the money by the right of prior possession. But the plaintiff never had any possession of the money, except, unwittingly, by having possession of the safe which contained it. Such possession, if possession it can be called, does not of itself confer a right. The case at bar is in this view like *Bridges v. Hawkesworth*, 15 Jur. 1079; 21 L. J. Q. B. 75, A.D. 1851; 7 Eng. L. & Eq. 424. In that case, the plaintiff, while in the defendant's shop on business, picked up from the floor a parcel containing bank notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendant as owner of the shop in which they were found. "The notes," said the court, "never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there." The same in effect may be said of the notes in the case at bar; for though they were originally deposited in the safe by design, they were not so deposited in the safe, after it became the plaintiff's safe, so as to be in the protection of the safe as *his* safe, or so as to affect him with any responsibility for them. The case at bar is also in this respect like *Tatum v. Sharpless*, 6 Phila. 18. There it was held, that a conductor who had found money which had been lost in a railroad car was entitled to it as against the railroad company.

The plaintiff also claims that the money was not lost but designedly left where it was found, and that therefore as owner of the safe he is entitled to its custody. He refers to cases in which it has

been held, that money or other property voluntarily laid down and forgotten is not in legal contemplation lost, and that of such money or property the owner of the shop or place where it is left is the proper custodian rather than the person who happens to discover it first. *State v. McCann*, 19 Mo. 249; *Lawrence v. The State*, 1 Humph. 228; *McAvoy v. Medina*, 11 Allen, 549. It may be questioned whether this distinction has not been pushed to an extreme. See *Kincaid v. Eaton*, 98 Mass. 139. But, however that may be, we think the money here, though designedly left in the safe, was probably not designedly put in the crevice or interspace where it was found, but that, being left in the safe, it probably slipped or was accidentally shoved into the place where it was found without the knowledge of the owner, and so was lost, in the stricter sense of the word. The money was not simply deposited and forgotten, but deposited and lost by reason of a defect or insecurity in the place of deposit.

The plaintiff claims that the finding was a wrongful act on the part of the defendant, and that therefore he is entitled to recover the money or to have it replaced. We do not so regard it. The safe was left with the defendant for sale. As seller he would properly examine it under an implied permission to do so, to qualify him the better to act as seller. Also under the permission to use it for his books, he would have the right to inspect it to see if it was a fit depository. And finally, as a possible purchaser he might examine it, for though he had once declined to purchase, he might on closer examination change his mind. And the defendant, having found in the safe something which did not belong there, might, we think, properly remove it. He certainly would not be expected either to sell the safe to another, or to buy it himself without first removing it. It is not pretended that he used any violence or did any harm to the safe. And it is evident that the idea that any trespass or tort had been committed did not even occur to the plaintiff's agent when he was first informed of the finding.

The general rule undoubtedly is, that the finder of lost property is entitled to it as against all the world except the real owner, and that ordinarily the place where it is found does not make any difference. We cannot find anything in the circumstances of the case at bar to take it out of this rule.

*We give the defendant judgment for costs.*

NOTE. — See *Keron v. Cashman*, 33 Atl. 1055. A boy picked up an old stocking, and he and his three comrades began to play with it. The stocking burst, and money therein was discovered. It was held that the boy who had picked up the stocking was entitled to only one quarter of the money.

## HAMAKER v. BLANCHARD.

90 Pa. 377. 1879.

MAY 27th, 1879. Before SHARSWOOD, C.J., MERCUR, GORDON, PAXSON, WOODWARD, TRUNKEY and STERRETT, JJ.

Error to the Court of Common Pleas of Mifflin County: Of May Term 1879, No. 57.

Assumpsit by James Blanchard and Sophia, his wife, for the use of the wife, against W. W. Hamaker.

This was an appeal from the judgment of a justice of the peace. The material facts were these: Sophia Blanchard was a domestic servant in a hotel in Lewistown, of which the defendant was the proprietor. While thus employed, she found in the public parlor of the hotel three twenty-dollar bills. On finding the money, she went with it to Mr. Hamaker and informed him of the fact, and upon his remarking that he thought it belonged to a whip agent, a transient guest of the hotel, she gave it to him, for the purpose of returning it to said agent. It was afterwards ascertained that the money did not belong to the agent, and no claim was made for it by any one. Sophia afterwards demanded the money of defendant, who refused to deliver it to her. Defendant admitted that he still had the custody of the money.

In the general charge the court (BUCHER, P. J.,) *inter alia*, said: "If you find that this was lost money, Hamaker did not lose it, and that it never belonged to him, but that it belonged to some one else who has not appeared to claim it, then you ought to find for the plaintiff, on the principle that the finder of a lost chattel is entitled to the possession and use of it as against all the world except the true owner. . . . The counsel for the defendant asks us to say that as the defendant was the proprietor of a hotel and the money was found therein, the presumption of law is that it belonged to a guest, who had lost it, and that the defendant has a right to retain it as against this woman, the finder, to await the demand of the true owner. I decline to give you such instructions; but charge you that under the circumstances there is no presumption of law that this money was lost by a guest at the hotel, or that the defendant is entitled to keep it as against this woman for the true owner."

The verdict was for the plaintiffs for \$60, with interest, and after judgment thereon, defendant took this writ and assigned for error the foregoing portions of the charge.

Mr. Justice TRUNKEY delivered the opinion of the court, June 9th, 1879.

It seems to be settled law that the finder of lost property has a valid claim to the same against all the world, except the true owner, and generally that the place in which it is found creates no exception

to this rule. But property is not lost, in the sense of the rule, if it was intentionally laid on a table, counter or other place, by the owner, who forgot to take it away, and in such case the proprietor of the premises is entitled to retain the custody. Whenever the surroundings evidence that the article was deposited in its place, the finder has no right of possession against the owner of the building: *McAvoy v. Medina*, 11 Allen (Mass.), 548. An article casually dropped is within the rule. Where one went into a shop, and as he was leaving picked up a parcel of bank notes, which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons, except the real owner: *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424.

The decision in *Mathews v. Harsell*, 1 E. D. Smith (N.Y.), 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes, which she handed to her mistress, to keep for her. Mrs. Barmore afterwards intrusted the notes to Harsell, for the purpose of ascertaining their value, informing him that she was acting for her servant, for whom she held the notes. Harsell sold them, and appropriated the proceeds; whereupon Mrs. Mathews sued him and recovered their value, with interest from date of sale. Such is that case. True, WOODRUFF, J., says: "I am by no means prepared to hold that a house-servant who finds lost jewels, money or chattels, in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer, for the benefit of the true owner." To that remark, foreign to the case as understood by himself, he added the antidote: "And yet the Court of Queen's Bench in England have recently decided that the place in which a lost article is found, does not form the ground of any exception to the general rule of law, that the finder is entitled to it against all persons except the owner." His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior.

The assignments of error are to so much of the charge as instructed the jury that, if they found the money in question was lost, the defendant had no right to retain it because found in his hotel, the circumstances raising no presumption that it was lost by a guest, and their verdict ought to be for the plaintiff. That the money was not voluntarily placed where it was found, but accidentally lost, is settled by the verdict. It is admitted that it was

found in the parlor, a public place open to all. There is nothing to indicate whether it was lost by a guest, or a boarder, or one who had called with or without business. The pretence that it was the property of a guest, to whom the defendant would be liable, is not founded on an act or circumstance in evidence.

Many authorities were cited, in argument, touching the rights, duties and responsibilities of an innkeeper in relation to his guests; these are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is as another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises; the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, where there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer, and gives him the article on his false pretence that he knows the owner and will restore it, she is entitled to have it back and hold it till the owner comes. A rule of law ought to apply to all alike. Persons employed in inns will be encouraged to fidelity by protecting them in equality of rights with others. The learned judge was right in his instructions to the jury.

*Judgment affirmed.*

MERCUR, J., dissents.

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### WEEKS v. HACKETT.

104 Me. 264. 1908.

ON exceptions and motions by defendant. Overruled.

Actions of trover, one by each plaintiff, brought to recover one third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other plaintiff and with the defendant in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard.

Plea in each case, the general issue with the following brief statement in each case:

"1. Defendant claims and says he is the owner of the property sued for, and that he found it under such circumstances as makes him the owner of the same as against the plaintiff.

"2. That if the plaintiff found any part of the same, which the defendant denies, then he is a joint owner, or co-tenant with the

plaintiff; and that defendant holds the money in trust for the real owner or party that deposited the same in the ground.

"3. Defendant claims by purchase of one Leonard J. Hackett, who was the owner of the land where the money was found, all the right, title and interest of the said Leonard J. Hackett, in and to the property sued for."

Tried together at the September term, 1907, Supreme Judicial Court, Franklin County. Each plaintiff recovered a verdict for \$291.20. The defendant excepted to certain rulings made by the presiding Justice during the trial and also filed general motions to have the verdicts set aside.

All the material facts are stated in the opinion.

Sitting: EMERY, C. J., WHITEHOUSE, PEABODY, SPEAR, CORNISH, KING, JJ.

WHITEHOUSE, J. These were actions of trover brought by each of these plaintiffs to recover one third in value of a certain quantity of coins of the United States and of certain foreign coins, alleged to have been found by each plaintiff jointly with the other and with the defendant Fessenden E. Hackett. It is not in controversy that the coins in question of the aggregate par value of \$1,284.67 were found contained in three metallic cans buried and concealed in the soil and underneath the surface of land owned by one Leonard J. Hackett in the town of New Vineyard; and it appears in evidence that after the coins were found and prior to the commencement of these actions, the defendant Fessenden E. Hackett purchased all the right, title and interest, if any, which Leonard J. Hackett had in and to these coins as owner of the land where they were found.

Three contentions were set up in defense.

1. That the defendant found the coins under circumstances which made him the sole owner of them as against these plaintiffs.

2. That if the plaintiffs participated in the finding, they are joint tenants or tenants in common with the defendant, that he is entitled to hold the coins in trust for the true owner, and that the plaintiffs as tenants in common cannot maintain trover against him for their respective shares.

3. That the defendant became the sole owner of the coins by purchase from Leonard J. Hackett, the owner of the premises where they were found.

The presiding Justice did not sustain the legal propositions involved in these contentions of the defendant, but instructed the jury in substance that gold or silver coin deposited in the soil as this appeared to have been, became what is known in law as treasure-trove the title to which does not pass with the soil, and that the owner of the premises where the coin was found acquired no title to it by virtue of his ownership of the land, and that the defendant

consequently acquired no title by purchase from Leonard J. Hackett; that if the coin was purposely buried in the soil and forgotten or its place of concealment remained undisclosed by reason of the death of the depositor, the finder acquired a right to the possession of it and a qualified property in it, subject to the right of the true owner when he appeared and in that sense became a trustee for the owner; but if several participated in the findings so as to become joint finders with equal rights, the ownership pertained to all of them, and one of them was not authorized to hold exclusive possession as against his fellows; and finally, that since the coins were separable and divisible by weight or count, if the defendant refused to deliver to each of such tenants in common the share to which he was entitled, an action of trover would lie against the defendant for the conversion of such number or portion of the coins as rightfully belonged to each of the joint finders.

The jury returned a verdict in favor of each plaintiff for the sum of \$291.20, being one third of the aggregate market value of the coins, and the cases come to the Law Court on exceptions to these instructions and on a motion to set aside the verdicts as against the law and the evidence.

1. It is the opinion of the court that the instructions given by the presiding Justice were correct and that the exceptions must be overruled.

Treasure-trove is a name given by the early common law to any gold or silver in coin, plate or bullion found concealed in the earth, or in a house or other private place, but not lying on the ground, the owner of the discovered treasure being unknown. 1 Black, 295. Cyc. vol. 19, page 339; A. & E. of Law, vol. 28, page 472; *Livermore v. White*, 74 Maine, 452; *Sovern v. Yoran*, 16 Or. 269, 8 Am. St. Rep. 293. To what extent the doctrine of the English common law in regard to treasure-trove has been merged, in this country, into the law respecting the finding of lost property, and whether in modern commercial life the term treasure-trove may be held to include not only gold and silver, but the paper representatives of them, are questions not necessary to be considered here (see *Huthmacher v. Harris*, 38 Pa. St. 499 and *Danielson v. Roberts et al.*, 44 Oreg. 108, 74 Pac. 913); for while it is not in controversy that the coins here in question clearly fall within the common law definition of treasure-trove, the general rule is established by a substantially uniform line of decisions in the American States, with respect to both lost goods, properly so termed, and treasure-trove, that in the absence of legislation upon the subject, the title to such property belongs to the finder as against all the world except the true owner and that ordinarily the place where it is found is immaterial. *Lawrence v. Buck*, 62 Maine, 275; *Durfee v. Jones*, 11 R.I. 588; *Hamaker v. Blanchard*, 90 Pa. St. 377; *Bowen v. Sullivan*, 62 Ind. 281 (30 Am. Rep. 172);



*Danielson v. Roberts*, 44 Or. 108 (74 Pac. 913); *Armory v. Delamirie*, 1 Strange, 504 (1 Smith's Lead. Cases, 631); *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424; 21 L. J. Q. B. 75. The owner of the soil in which treasure-trove is found acquires no title thereto by virtue of his ownership of the land. *Reg. v. Thomas, Leigh & Cave* Eng. Cr. cases; 28 A. & E. Enc. of Law (2d Ed.), 473. According to Bracton, lib. 3, cap. 3, as quoted in Viner's Abridgment, "he to whom the property is shall have treasure-trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure"; and according to Lord COKE (3 Inst. 132), the common law originally left treasure-trove to the person who deposited it, or upon his omission to claim it, to the finder. 2 Kent's Com. 458. The rule of the common law respecting the rights and duties of the finder of lost money or goods has been variously modified by the terms and provisions of local statutes of many States, but the provisions of the Maine Statutes (R. S., ch. 100, sect. 10, et seq.) have no reference to the law of treasure-trove.

In *Danielson et al. v. Roberts et al.*, 44 Or., *supra*, in which the facts were strikingly analogous to those at bar, two boys unearthed on the defendant's premises an old tin can containing gold coin of the value of \$7000. The circumstances under which the money was discovered, the rust-eaten condition of the can in which it was contained, and the place of deposit, tended strongly to show that it had been buried for a long time, and that the owner was probably dead or unknown. It was held that the fact the money was found on the premises of the defendants in no way affected the plaintiffs' right to possession or their duty in relation to the treasure, and that they could maintain trover therefor against the defendants to whom they had been induced to deliver the money. In a well-reasoned opinion, the court say: "Ever since the early case of *Armory v. Delamirie*, 1 Strange, 504, where it was held that the finder of a jewel might maintain trover for the conversion thereof by a wrongdoer, the right of the finder of lost property to retain it against all persons except the true owner has been recognized. In that case a chimney sweeper's boy found a jewel, and carried it to a goldsmith to ascertain what it was. The goldsmith refused to return it, and it was held that the boy might maintain trover on the ground that by the finding he had acquired such a property in the jewel as would entitle him to keep it against all persons but the rightful owner. This case has been uniformly followed in England and America, and the law upon this point is well settled. *Sovern v. Yoran*, 16 Or. 269, 20 Pac. 100, 8 Am. St. Rep. 293; 19 Am. & Eng. Ency. Law (2d Ed.), 579. But it is argued that property is lost in the legal sense of that word only when the possession has been casually and involuntarily parted with, and not when the owner

purposely and voluntarily places or deposits it in a certain place for safe-keeping, although he may thereafter forget it, and leave it where deposited, or may die without disclosing to any one the place of deposit.

"But at the present stage of the controversy it is immaterial whether the money discovered by plaintiffs was technically lost property or treasure-trove, or, if treasure-trove, whether it belongs to the State or the finder, or should be disposed of as lost property if no owner is discovered. In either event the plaintiffs are entitled to the possession of the money as against the defendants, unless the latter can show a better title. The reason of the rule giving the finder of lost property the right to retain it against all persons except the true owner applies with equal force and reason to money found hidden or secreted in the earth as to property found on the surface."

In *Durfee v. Jones*, 11 R.I. 588, the plaintiff bought an old safe and soon afterwards, through his agent, left it for sale with the defendant, who was a blacksmith. Upon examination of it soon after it was left with him, the defendant found secreted between the exterior and the lining a roll of bank bills amounting to \$165. Neither the plaintiff nor the defendant knew the money was there before it was found, and the owner was unknown. The plaintiff brought suit against the defendant to recover the money, claiming that as owner of the safe he was entitled to the money by right of prior possession. But the court held that the plaintiff "never had any possession of the money except unwittingly, by having possession of the safe which contained it; that although it was originally deposited in the safe by design, it was not so deposited after the safe became the property of the plaintiff so as to be in the protection of the safe as *his* safe, or so as to affect him with any responsibility for it," and it was accordingly held that the plaintiff as finder of the money was entitled to retain it as against the defendant, the owner of the safe, and as against all the world except the real owner.

In *Bowen v. Sullivan*, 62 Ind., *supra*, the plaintiff while engaged as an employee in the defendant's paper mill found two fifty dollar bank bills, in a clean unmarked envelope, in a bale of old paper which the defendant had bought for manufacture, and delivered the bills to the defendant for the purpose of ascertaining if they were good and upon his promise to return them. The defendant refusing to return them, the plaintiff brought suit to recover their value, and the court held that she was entitled to recover, citing among other cases, *Lawrence v. Buck*, 62 Maine, 275; *Durfee v. Jones*, 11 R.I. 588, and *Armory v. Delamirie*, 1 Strange, 505, *supra*, and stating that the place of the finding was ordinarily immaterial.

[The result therefore seems unquestionable that in the case at bar, the coins sued for belonged to the finder or finders as against all]

the world except the true owner, or his legal representatives, when discovered. . . .

*Exceptions and motions overruled.*

NOTE. — Cf. *Ferguson v. Ray*, 44 Oreg. 557, in which valuable chattels, buried in the ground, were held to belong to the owner of the soil, rather than the finder.

### McAVOY v. MEDINA.

11 Allen (Mass.), 548. 1866.

TORT to recover a sum of money found by the plaintiff in the shop of the defendant.

At the trial in the superior court, before MORTON, J., it appeared that the defendant was a barber, and the plaintiff, being a customer in the defendant's shop, saw and took up a pocket-book which was lying upon a table there, and said, "See what I have found." The defendant came to the table and asked where he found it. The plaintiff laid it back in the same place and said, "I found it right there." The defendant then took it and counted the money, and the plaintiff told him to keep it, and if the owner should come to give it to him; and otherwise to advertise it; which the defendant promised to do. Subsequently the plaintiff made three demands for the money, and the defendant never claimed to hold the same till the last demand. It was agreed that the pocket-book was placed upon the table by a transient customer of the defendant and accidentally left there, and was first seen and taken up by the plaintiff, and that the owner had not been found.

The judge ruled that the plaintiff could not maintain his action, and a verdict was accordingly returned for the defendant; and the plaintiff alleged exceptions.

DEWEY, J. It seems to be the settled law that the finder of lost property has a valid claim to the same against all the world except the true owner, and generally that the place in which it is found creates no exception to this rule. 2 Parsons on Con. 97. *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. R. 424.

But this property is not, under the circumstances, to be treated as lost property in that sense in which a finder has a valid claim to hold the same until called for by the true owner. This property was voluntarily placed upon a table in the defendant's shop by a customer of his who accidentally left the same there and has never called for it. The plaintiff also came there as a customer, and first saw the same and took it up from the table. The plaintiff did not by this acquire the right to take the property from the shop, but it was

rather the duty of the defendant, when the fact became thus known to him, to use reasonable care for the safe-keeping of the same until the owner should call for it. In the case of *Bridges v. Hawkesworth* the property, although found in a shop, was found on the floor of the same, and had not been placed there voluntarily by the owner, and the court held that the finder was entitled to the possession of the same, except as to the owner. But the present case more resembles that of *Lawrence v. The State*, 1 Humph. (Tenn.) 228, and is indeed very similar in its facts. The court there take a distinction between the case of property thus placed by the owner and neglected to be removed, and property lost. It was there held that "to place a pocket-book upon a table and to forget to take it away is not to lose it, in the sense in which the authorities referred to speak of lost property."

We accept this as the better rule, and especially as one better adapted to secure the rights of the true owner.

In view of the facts of this case, the plaintiff acquired no original right to the property, and the defendant's subsequent acts in receiving and holding the property in the manner he did does not create any.

*Exceptions overruled.*

NOTE. — See, accord, *Kincaid v. Eaton*, 98 Mass. 139; *Hoagland v. Amusement Co.*, 170 Mo. 335, 342.

## SECTION 3.

## RIGHTS OF A MERE POSSESSOR.

## TAPSCOTT v. COBBS.

11 Gratt. (Va.) 172. 1854.

THIS was an action of ejectment in the circuit-court of Buckingham County, brought in February, 1846, by the lessee of Elizabeth A. Cobbs and others against William H. Tapscott. Upon the trial the defendant demurred to the evidence. It appears that Thomas Anderson died in 1800, having made a will, by which he appointed several persons his executors, of whom John Harris, Robert Rives and Nathaniel Anderson qualified as such. By his will his executors were authorized to sell his real estate.

At the time of Thomas Anderson's death the land in controversy had been surveyed for him, and in 1802 a patent was issued therefor to Harris, Rives and N. Anderson as executors. Some time between the years 1820 and 1825, the executors sold the land at public auction, when it was knocked off to Robert Rives; though it appears from a contract between Rives and Sarah Lewis, dated in September, 1825, that the land had, prior to that date, been sold by the executors to Mrs. Lewis for three hundred and sixty-seven dollars and fifty cents. This contract was for the sale by Mrs. Lewis to Rives of her dower interest in another tract of land, for which Rives was to pay to the executors of Thomas Anderson the sum of two hundred and seventeen dollars and fifty cents in part of her purchase. In a short time after her purchase she moved upon the land, built upon and improved it, and continued in possession until 1835, when she died. In 1825 the executor Harris was dead, and Nathaniel Anderson died in 1831, leaving Rives surviving him. And it appears that in an account settled by a commissioner in a suit by the devisees and legatees of Thomas Anderson against the executors of Robert Rives, there was an item under date of the 28th of August, 1826, charging Rives with the whole amount of the purchase money, in which it is said, "The whole not yet collected, but Robert Rives assumes the liability."

There is no evidence that the heirs of Mrs. Lewis were in possession of the land after her death, except as it may be inferred from the fact that she had been living upon the land from the time of her purchase until her death, and that she died upon it.

The proof was that Cobbs took possession of the land about the ✓

year 1842, without, so far as appears, any pretense of title. He made an entry with the surveyor of the county in December, 1844, with a view to obtain a patent for it.

The court gave a judgment upon the demurrer for the plaintiffs, and Tapscott thereupon applied to this court for a *supersedeas*, which was allowed.

DANIEL, J. It is no doubt true, as a general rule, that the right of a plaintiff in ejectment to recover, rests on the strength of his own title, and is not established by the exhibition of defects in the title of the defendant, and that the defendant may maintain his defense by simply showing that the title is not in the plaintiff, but in some one else. And the rule is usually thus broadly stated by the authorities, without qualification. There are, however, exceptions to the rule as thus announced, as well established as the rule itself. As when the defendant has entered under the title of the plaintiff he cannot set up a title in a third person in contradiction to that under which he entered. Other instances might be cited in which it is equally as well settled that the defendant would be estopped from showing defects in the title of the plaintiff. In such cases the plaintiff may, and often does recover, not by the exhibition of a title good in itself, but by showing that the relations between himself and the defendant are such that the latter cannot question it. The relation between the parties stands in the place of title; and though the title of the plaintiff is tainted with vices or defects that would prove fatal to his recovery in a controversy with any other defendant in peaceable possession, it is yet all sufficient in a litigation with one who entered into the possession under it, or otherwise stands so related to it that the law will not allow him to plead its defects in his defense.

Whether the case of an intrusion by a stranger without title, on a peaceable possession, is not one to meet the exigencies of which the courts will recognize a still further qualification or explanation of the rule requiring the plaintiff to recover only on the strength of his own title, is a question which, I believe, has not as yet been decided by this court. And it is somewhat remarkable that there are but few cases to be found in the English reporters in which the precise question has been decided or considered by the courts.

The cases of *Read & Morpeth v. Erington*, Croke Eliz. 321; *Bateman v. Allen*, Ibid. 437; and *Allen v. Rivington*, 2 Saund. R. 111, were each decided on special verdicts, in which the facts with respect to the title were stated. In each case it was shown that the plaintiff was in possession, and that the defendant entered without title or authority; and the court held that it was not necessary to decide upon the title of the plaintiff, and gave judgment for him. In the report of *Bateman v. Allen*, it is said that Williams, Sergeant, moved, "that forasmuch as in all the verdict it is not found that the defendant had the *primer* possession, nor that he entered in the right or by

✓ the command of any who had title, but that he entered on the possession of the plaintiff without title, his entry is not lawful"; and so the court held.

✓ And in *Read & Morpeth v. Erington*, it was insisted that for a portion of the premises the judgment ought to be for the defendant, inasmuch as it appeared from the verdict that the title to such portion was outstanding in a third party; but the court said it did not matter, as it was shown that the plaintiff had entered, and the defendant had entered on him.

I have seen no case overruling these decisions. It is true that in *Haldane v. Harvey*, 4 Burr. R. 2484, the general doctrine is announced that the plaintiff must recover on the strength of his own title; and that the "possession gives the defendant a right against every man who cannot show a good title." But in that case the circumstances under which the defendant entered, and the nature of the claim by which he held, do not appear; and the case, therefore, cannot properly be regarded as declaring more than the general rule.

The same remark will apply to other cases that might be cited, in which the general rule is propounded in terms equally broad and comprehensive.

In 2 T. R. 749, we have nothing more than the syllabus of the case of *Crisp v. Barber*, in which it is said that a lease of a rectory-house, etc., by a rector becomes void by 13th Eliz. ch. 20, by his non-residence for eighty days, and that a stranger may take advantage of it. And that the lessee cannot maintain ejectment against a stranger who enters without any title whatever.

And in *Graham v. Peat*, 1 East's R. 244, in which, upon a like state of facts, arising under the same statute, the plaintiff brought trespass instead of ejectment, it was held that his possession was sufficient to maintain trespass against a wrong-doer, the chief justice, Lord KENYON, remarking, that "if ejectment could not have been maintained, it was because that is a fictitious remedy founded upon title."

These two cases as reported may, perhaps, when taken in connection, be fairly regarded as holding that mere possession by the plaintiff will justify the action of trespass against an intruder, but is not sufficient to maintain ejectment. If so, they are in conflict with the earlier decisions before cited. It is to be observed, however, of the first of these cases, that we have no statement of the grounds on which it was decided; and of the last, that it does not directly present the question whether ejectment could or could not have been maintained. And I do not think it would be just to allow them to outweigh decisions in which the precise question was fairly presented, met and adjudicated: the more especially, as the doctrine of the earlier cases is reasserted by Lord TENTERDEN in the case of *Hughes v. Dyball*, 14 Eng. C. L. R. 481. In that case, proof that the plaintiff let the *locus in quo* to a tenant who held peaceable possession for

about a year, was held sufficient evidence of title to maintain ejectment against a party who came in the night and forcibly turned the tenant out of possession. In Archbold's *Nisi Prius*, vol. 2, p. 395, the case is cited with approbation, and the law stated in accordance with it. In this country the cases are numerous, and to some extent conflicting, yet I think that the larger number will be found to be in accordance with the earlier English decisions. I have found no case in which the question seems to have been more fully examined or maturely considered than in *Sowden, etc. v. McMillan's heirs*, 4 Dana's R. 456. The views of the learned judge (MARSHALL) who delivered the opinion in which the whole court concurred, are rested on the authority of several cases in Kentucky, previously decided, on a series of decisions made by the supreme court of New York, and on the three British cases of *Bateman v. Allen*, *Allen v. Rivington*, and *Read & Morpeth v. Erington*, before mentioned. "These three cases (he says) establish unquestionably the right of the plaintiff to recover when it appears that he was in possession, and that the defendant entered upon and ousted his possession, without title or authority to enter; and prove that when the possession of the plaintiff and an entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another; but only by showing that the defendant himself either has title or authority to enter under the title."

"It is a natural principle of justice, that he who is in possession has the right to maintain it, and if wrongfully expelled, to regain it by entry on the wrong-doer. When titles are acknowledged as separate and distinct from the possession, this right of maintaining and regaining the possession is, of course, subject to the exception that it cannot be exercised against the real owner, in competition with whose title it wholly fails. But surely it is not accordant with the principles of justice, that he who ousts a previous possession should be permitted to defend his wrongful possession against the claim of restitution merely by showing that a stranger, and not the previous possessor whom he has ousted, was entitled to the possession. The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it. While the peaceable possession continues, it is protected against a claimant in the action of ejectment, by permitting the defendant to show that a third person and not the claimant has the right. But if the claimant, instead of resorting to his action, attempt to gain the possession by entering upon and ousting the existing peaceable possession, he does not thereby acquire a rightful or a peaceable possession. The law does not protect him against the prior possessor. Neither does it indulge any presumption in his favor, nor permit him to gain any advantage by his own wrongful act."



In *Adams v. Tiernan*, 5 Dana's R. 394, the same doctrine is held; it being there again announced that a peaceable possession wrongfully divested, ought to be restored, and is sufficient to maintain the action; and that no mere outstanding superior right of entry in a stranger can be used availably as a shield by the trespasser in such action. It has also been repeatedly reaffirmed in later decisions of the supreme court of New York; and may therefore be regarded as the well-settled law of that state and of Kentucky.

To the same effect are the decisions in New Jersey, Connecticut, Vermont and Ohio. *Penton's lessee v. Sinnickson*, 4 Halst. R. 149; *Law v. Wilson*, 2 Root's R. 102; *Ellithorp v. Dewing*, 1 Chipm. R. 141; *Warner v. Page*, 4 Verm. R. 294; *Ludlow's heirs v. McBride*, 3 Ohio R. 240; *Newnam's lessee v. The City of Cincinnati*, 18 Ohio R. 327. In the case of *Ellithorp v. Dewing*, 1 Chipm. R. 141, the rule is thus stated: "Actual seizin is sufficient to recover as well as to defend against a stranger to the title. He who is first seized may recover or defend against any one except him who has a paramount title. If disseized by a stranger, he may maintain an action of ejectment against the disseizor, and in like manner the disseizor may maintain an action against all persons except his disseizee, or some one having a paramount title."

In Delaware, North Carolina, South Carolina, Indiana, and perhaps in other states of the Union, the opposite doctrine has been held.

In this state of the law, untrammelled as we are by any decisions of our own courts, I feel free to adopt that rule which seems to me best calculated to attain the ends of justice. The explanation of the law (as usually announced) given by Judge MARSHALL in the portions of his opinion which I have cited, seems to me to be founded on just and correct reasoning; and I am disposed to follow those decisions which uphold a peaceable possession for the protection as well of a plaintiff as of a defendant in ejectment, rather than those which invite disorderly scrambles for the possession, and clothe a mere trespasser with the means of maintaining his wrong, by showing defects, however slight, in the title of him on whose peaceable possession he has intruded without shadow of authority or title.

The authorities in support of the maintenance of ejectment upon the force of a mere prior possession, however, hold it essential that the prior possession must have been removed by the entry or intrusion of the defendant; and that the entry under which the defendant holds the possession must have been a trespass upon the prior possession. *Towden v. McMillan's heirs*, 4 Dana's R. 456. And it is also said that constructive possession is not sufficient to maintain trespass to real property; that actual possession is required, and hence that where the injury is done to an heir or devisee by an abator, before he has entered, he cannot maintain trespass until his re-entry.

2 Tucker's Comm. 191. An apparent difficulty, therefore, in the way of a recovery by the plaintiffs, arises from the absence of positive proof of their possession at the time of the defendant's entry. It is to be observed, however, that there is no proof to the contrary. Mrs. Lewis died in possession of the premises, and there is no proof that they were vacant at the time of the defendant's entry. And in Gilbert's Tenures, 37 (in note), it is stated, as the law, that as the heir has the right to the hereditaments descending, the law presumes that he has the possession also. The presumption may indeed, like all other presumptions, be rebutted: but if the possession be not shown to be in another, the law concludes it to be in the heir.

The presumption is but a fair and reasonable one; and does, I think, arise here; and as the only evidence tending to show that the defendant sets up any pretense of right to the land, is the certificate of the surveyor of Buckingham, of an entry by the defendant, for the same, in his office, in December, 1844; and his possession of the land must, according to the evidence, have commenced at least as early as some time in the year 1842; it seems to me that he must be regarded as standing in the attitude of a mere intruder on the possession of the plaintiffs.

Whether we might not in this case presume the whole of the purchase money to be paid, and regard the plaintiffs as having a perfect equitable title to the premises, and in that view as entitled to recover by force of such title; or whether we might not resort to the still further presumption in their favor, of a conveyance of the legal title, are questions which I have not thought it necessary to consider; the view, which I have already taken of the case, being sufficient, in my opinion, to justify us in affirming the judgment.

*Judgment affirmed.*

ALLEN, MONCURE and SAMUELS, Js., concurred in the opinion of DANIEL, J.

LEE, J., dissented.

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TODD v. JACKSON.

2 Dutch. (N.J.) 525. 1857.

ACTION in trespass in which the plaintiff sought to recover full damages for a permanent injury to land.

THE CHANCELLOR. This deed was evidently admitted by the court below, for the purpose of measuring the damages which the plaintiffs were entitled to recover. The injury done by the trespass was to the permanent injury of the freehold; and the judge seemed to think that, in order to entitle the plaintiffs in this case to recover the full extent of the injury done, it was necessary for them to show

their title. The judge said to the jury: "If the plaintiffs had no interest, then, beyond a naked possession, the amount of their recovery should be graduated by one scale; if their possession was coupled with an interest in the estate real and personal, or either, it should be graduated by another scale." The Supreme Court, adopting this view of the judge at the circuit, and citing with approbation this part of his charge, took it for granted that if the principles thus laid down were correct (and they certainly were), the materiality of the deed, as to the extent of the damages which the plaintiffs were entitled to recover, was beyond dispute. Here, I think, both the judge at the circuit and the Supreme Court erred, and that the deed was not material to any questions which were submitted to the jury, because the plaintiffs' title, beyond their possession, was not put in issue by the pleadings, nor by the defendants, on the trial, in mitigation of damages.

In order to establish the materiality of that deed as evidence, you must maintain the broad proposition that, in an action of trespass *quare clausum*, it is necessary, in order to entitle the plaintiff to recover the full extent of damages done to the freehold, that he should prove his title to the inheritance. If the proposition be true, then if A bring an action against B for cutting down timber trees upon his land or pulling down a house, A cannot recover the value of the building or of the trees cut, unless he shows his title in the land in addition to his possession. I think it may be affirmed with great confidence that such a principle cannot be found laid down by any elementary writer, and that no respectable authority can be found for it.

The action of trespass, both as to real and personal property, is a possessory action. A party in possession is, *prima facie*, the owner, and that possession will entitle him to recover to the extent of the injury done, unless the defendant show something in mitigation of the damages. If, then, the defendants could avail themselves of the principle laid down by the judge, "that, if the plaintiffs had no interest there beyond a naked possession, the amount of their recovery should be graduated by one scale," it was incumbent on them, in order to entitle themselves to have the damages graduated by that scale, to prove that the plaintiffs had no interest beyond a naked possession, or to qualify their possession in some way. The defendants raised no such issue before that jury. They offered no evidence to qualify the possession of the plaintiffs. They did not rebut the *prima facie* case, which resulted from the fact of possession, that the plaintiffs were entitled to recover to the full extent of the injury. It would be a monstrous doctrine to establish, and fraught with innumerable evils, that a plaintiff in trespass cannot recover for a permanent injury done to the freehold, and to the full extent of the injury, without first establishing his title to the freehold, in

addition to his title by possession. What would be the consequence in those numerous cases where men are in peaceable possession of property, and have paid for it, and yet through some neglect have failed to procure a title, or have lost their title deed? Can any stranger enter upon such possession, pull down the dwelling house over the head of the occupant, and when called to respond in damages, complacently ask the person he has injured to exhibit his documentary evidence of title? A man who is in possession of a dwelling house has, by that possession, a title good against all the world for every purpose, until a superior one is shown; and most certainly it cannot be the law, and ought not, that such possession is not *prima facie* evidence of title against a wanton wrong-doer. It is certainly true, as stated by the Supreme Court, that a *reversioner* may bring his action on the case for damages done to the freehold affecting his reversionary interest. But if it be correct, that a person in possession cannot recover damages for an injury for which the reversioner is entitled to his action, the trespasser must show that there is such a reversioner, and that the damages should be mitigated, because he, the defendant, is answerable over for the same injury to another person.

NOTE. — In *Woods v. Banks*, 14 N.H. 101, the court said (p. 113): "The plaintiff's possession is *prima facie* evidence of title. There is nothing in the case now to rebut it. There is in fact nothing to lead to a supposition that the defendant can be made liable to the action of any other person. The possession of the plaintiff, then, and the evidence of title which it furnishes, stands wholly unimpeached."

See also *Rau v. Minnesota R.R. Co.*, 13 Minn. 442, 445.

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ILLINOIS COAL CO. v. COBB.

94 Ill. 55. 1879.

MR. CHIEF JUSTICE WALKER delivered the opinion of the court. . . .

Another ground is urged, in reference to the question of damages, for a reversal. Appellant gave evidence tending to prove an outstanding title to the property in controversy in the village of Cahokia. And appellant asked, but the court refused to give, this instruction: —

"If the defendant has shown that the title to the land described by the declaration, at the time when the trespass is said to have been committed, was outstanding, that is to say, not in the plaintiff, the plaintiff cannot recover damages for an injury that may have been done to the freehold or to the land, soil or sand, but only such

J injury, if any have been shown, that was done to the possession or property of the plaintiff."

~~This raises the question whether a mere trespasser may justify his wrong to all but the actual damage done to the possession, by showing a title in a third person.~~ Or, to state the proposition differently, can he mitigate the damages so as to prevent a recovery for all damages beyond the actual injury to this mere possession.

Judge COOLEY, in his work on Torts, p. 326, says: "Presumptively, a peaceful possession is always rightful, and the proof of it is sufficient evidence of the title to enable one to recover in ejectment against one subsequently found in possession and who shows no right in himself."

Where lands are in the possession of a tenant, and a trespass is committed on the land, the law is long and well settled that the tenant may sue and recover for the injury he has suffered by reason of the loss he has sustained as a tenant, and the landlord as a reversioner may sue and recover in respect to the injury he has sustained to his reversion. In such a case, there may be two recoveries for injuries to the respective estates, of the tenant and the landlord. This was so held by the British courts at an early day, and the rule has never been disregarded by the courts of that country or by the courts of the various States of the Union, so far as our researches have led us in the investigation of the question. But no such relation exists in this case, and that rule can have no application here.

In the case of *Catteris v. Cowper*, 4 Taunt. 547, the plaintiff sued for trespass in entering upon land lying between premises rented by plaintiff, and the river Ouse, by the defendant, and cutting grass. The land bore grass which every one cut who chose, until two years before the action was brought, and plaintiff's only title was, that two years previously he had taken possession and twice mowed the grass, and afterwards pastured a cow on the strip.

The defendant's case was, that the plaintiff, when he first cut the grass, had boasted that he cut hay on land for which he paid neither rent nor taxes; that in a former year he had purchased the hay cut by another man on the ground, and that a few years before the trial, in repairing the boundary fence of his farm, plaintiff had excluded, by his fence, the land in question, and had frequently shown to other persons the boundaries of his farm as excluding this land; but HEATH, who tried the case, excluded this evidence offered by defendant, and the plaintiff recovered. Afterwards, on a rule to show cause why the verdict should not be set aside and a new trial granted, on a trial in the Common Pleas, the rule was discharged. The court said: "The case was decided rightly upon the merits. The defendant stands neither on any former possession of his own nor derives title under the possession of any other person. His only objection to the plaintiff's recovery is, that he has not proved the title he stood on;

that this land was parcel of the farm he held; but no answer is given to the fact of his prior possession. The merits are clearly against the defendant." The rule announced seems to have been so clear as to have called for the reference to no authority or any reasoning to establish the rule.

In *Allen v. Rivington*, 2 Saund. 111, and *Doe ex dem. Borough v. Reade*, 8 East, 356, it was held, that a party could recover in ejectment, or defend in such an action, on a former mere naked possession. In the case of *Day v. Alverson*, 9 Wend. 223, it was held, that a plaintiff claiming the premises in fee is entitled to recover, although he only show title by possession. In the case of *Jackson ex dem. etc. v. Town*, 4 Cow. 602, it was held, that actual possession is *prima facie* evidence of legal title to the premises for which ejectment is brought; and it is one of the most familiar rules, that any person in the actual possession of land may recover in trespass against a wrongdoer. In fact, the plaintiff must have the actual possession, or the legal title which draws to it the legal possession, before he can recover in trespass.

In *Graham v. Peat*, 1 East, 244, it was held, where one was in possession of glebe lands under a lease void under the statute by reason of the non-residence of the rector, that he might nevertheless recover in trespass upon his possession against a wrongdoer. At *Nisi Prius*, the plaintiff, on proof of the absence of the rector the length of time necessary to render the lease void, was nonsuited; but the Court of King's Bench reversed the judgment, holding that plaintiff was entitled to recover, as the defendant had shown no title, but was only a wrongdoer. Lord KENYON said: "Any possession is a legal possession against a wrongdoer." Suppose a burglary committed in a dwelling house of such a one, must it not be laid to be his dwelling house notwithstanding the defect of his title under the statute?"

The same question was again before the court in *Chambers v. Donaldson*, 11 East, 65. In this last case a plea was filed that the soil and freehold were the property of one Postman, and that defendants, as his servants and by his command, broke and entered the close. To this plea plaintiff replied, admitting that Postman was the owner of the soil and freehold, etc., and traversed that they were the servants, etc., and by his command committed the trespass in the manner and form as in the plea mentioned. A demurrer was filed to this replication, and causes were assigned that though the replication admitted that the dwelling house was the soil and freehold of Postman, yet by his replication he stated that one Green demised the dwelling house to plaintiff to hold as therein mentioned without showing any legal title to do so. And because plaintiff admitted Postman to be the owner of the dwelling house but had not deduced any title from him to Green, and that plaintiff had attempted to put in issue an immaterial fact, etc.

On the argument it was conceded on both sides, that by showing that the title was in a third person and defendant had entered by his command, the plaintiff, to recover, would have been required to show title in himself. And it was claimed that the authority to enter, averred in the plea, was not traversable, but by merely showing title in another than the plaintiff, he was barred of a recovery. But the judges concurred in holding that the command of the owner to enter was traversable. Lord ELLENBOROUGH said: "Unless the command be traversable it will be sufficient for a mere wrongdoer, who has invaded the quiet possession of the plaintiff, to plead title in another and under authority from him, although that other did not question the plaintiff's possession. Nay, . . . it might be contended that the same defence could be set up against a plaintiff who had been in possession for twenty years, and this monstrous consequence would ensue, that the wrongdoer would protect himself under a title which the party himself could not assert in any possessory action. But since it has been settled . . . that trespass may be maintained by a person in possession, against a wrongdoer, we are called upon to strip the wrongdoer of this shield." See, also, *Harker v. Birkbeck*, 3 Burr. 1556. Other English cases might be cited in support of the doctrine if it was deemed necessary.

In Sedgwick on Damages, 149, it is said: "It is well settled in England, and generally in the United States, that, to entitle the plaintiff to bring an action of trespass *quare clausum fregit*, possession in fact is indispensable; and as against a wrongdoer, bare possession is sufficient." The rule is sustained by the cases of *First Parish, etc. v. Smith*, 14 Pick. 297; *Branch v. Dane*, 18 Conn. 233; *Curtis v. Hoyt*, 19 id. 154. In this last case, it was held, that the plaintiff in trespass, having the sole and exclusive possession, may recover against the wrongdoer the whole damage done by him, though the conveyance from some of those under whom he claims was defective.

In the case of *Harker v. Dement*, 9 Gill, 7, it was held, that in an action by a termor against his reversioner, the measure of damages is the actual loss sustained by the lessee; but in such an action against a stranger and wrongdoer, the termor is treated as the absolute owner of the property, and is held to be entitled to recover its full value. The general rule is announced in *Webb v. Sturtevant*, 1 Scam. 181. See, also, *Gilbert v. Kennedy*, 22 Mich. 5. It will be observed that in none of these cases is anything said as to showing an outstanding title in mitigation or reduction of damages; nor have we found any case, nor has appellant's counsel referred us to any, which has so held, unless it is where the plaintiff was a tenant. If such cases exist, we and counsel have been unable to find them; nor do the text books suggest any such distinction, whilst they do where the plaintiff is a tenant, or holds under another; that he only has an action for injury

done to his mere possessory right, and the landlord, or reversioner, for all damage done to the reversion. If the rule is different from that stated in the adjudged cases and commentators to whom we have referred, we should have found the distinction between the rights of the true owner and the person in possession — the presumptive owner — stated in some adjudged case.

There is a broad distinction between a case where a mere trespasser commits the wrong without title, and where it is done by the owner of the title, or by one authorized by him to commit the wrong. In this latter case the person in peaceable possession can only recover the damage he has sustained to his possessory right. But a person in peaceable possession, suing for a trespass to the freehold, should never be put upon proof of his title to recover against a wrongdoer having no title. Being in possession the law presumes him to be the owner, and will not permit a wrongdoer to question or call upon him to produce his title to sustain his action.

*Where owner  
tresp.  
one having  
no title*

When this case was previously before us, it was held that the prior peaceable possession of Cobb claiming title was sufficient to warrant a recovery as against a wrongdoer. And in that case there was an instruction asked and refused, which was similar in principle to this one, and whilst it was not commented on it was regarded as vicious. This question was then argued, and in disposing of it, without referring to the instruction, it was said: "The whole case must turn upon the question of the date and nature of the several possessions set up by the parties respectively." The instruction was thus condemned. Had it been held good, its refusal would have been noticed as a ground for reversal.

To hold that a wrongdoer may put a plaintiff in peaceable possession upon the proof of his title, to enable him to a recovery, would be a harsh rule. If there should be any technical objection to any link in his chain of title he would fail, although no other person was claiming title and might never claim. His title might be clearly equitable, unclaimed and unchallenged by the person holding the legal title, and yet, if such a rule should prevail, the equitable owner and occupant might have his property destroyed and only recover nominal damages. Many titles are defective in the want of proper acknowledgments or other mere technical defects, and yet no one claims or challenges the title of the occupant claiming to be the owner, and shall it be said, that he shall not be protected against a reckless, lawless wrongdoer? The wrongdoer should in justice make recompense to some one for the wrong and loss he has inflicted upon the property, and no reason is perceived why he should have a choice as to whom he will pay the damages. A recovery by the occupant is a bar to all future recoveries, and it in nowise concerns him who shall have the benefit of that recovery. *Benjamin v. Stumph*, 13 Ill. 466; *Lyle v. Baker*, 5 Binn. 457; *Chamberlin v. Shaw*, 18 Pick. 278; and



*White v. Webb*, 15 Conn. 302, show a recovery as against a wrongdoer may be had of the full value when a recovery is had.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

NOTE. — See, *accord*, *Reed v. Price*, 30 Mo. 442.

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### WINCHESTER v. CITY OF STEVENS POINT.

58 Wis. 350. 1883.

COLE, C.J. It is plain that the plaintiff in her complaint does not treat this as an ordinary action of trespass to the realty. She alleges that she was the owner in fee simple and in the actual possession of the premises described. Her gravamen is that the defendant city has constructed a dike or embankment in front of these premises, which renders them inaccessible, and that this embankment dams up the water and sets it back upon her lots. Then comes the averment, "by means whereof the said premises are greatly diminished in value, and the plaintiff has sustained damage in the sum of \$700." If there could be any doubt that the action is for a permanent injury to the realty, it would be removed by the character of the evidence offered on the part of the plaintiff on the trial to sustain her case. For instance, the witness Packard was asked what, in his opinion, was the damage to the premises arising from the building of the dike, and then how much they were damaged in value by reason of the damming up of the water and setting it about the premises. This and other testimony, of the same character, was given by plaintiff against defendant's objection. The court, also, in one portion of its charge, in effect told the jury that the plaintiff, in order to recover, must satisfy them that she was the owner of the property alleged to be injured. These remarks are made for the purpose of showing that the action is not for the mere injury to the possession, but is to recover damages for an injury to the freehold. That being the case, it was essential for the plaintiff to show a title beyond what would be necessary to maintain trespass; for the question of title was made a material issue by the pleadings. There was no dispute about plaintiff's possession. But she attempted to prove a good paper title and failed. Nevertheless, she recovered for the permanent depreciation in the value of the property. The question is, Can the recovery be sustained upon the evidence given?

It seems to be assumed that damages for a permanent injury to the freehold — that is, an injury which not only affects the present use and enjoyment of the property, but its value for all future time — are recoverable in this action, though it is apparent the embankment may be removed any day, or so reduced in height as to restore

the property to its condition when she acquired it. There doubtless may be an injury to the freehold which is permanent in its character; but was this such an one? The suggestion is made without deciding the point.

But what proof of title was it necessary for the plaintiff to make in order to maintain the action on the theory upon which it was tried? Her counsel contends it was sufficient for her to show she was in actual possession under claim of title. He also says that she established a good paper title; but this certainly is a mistake. Not to dwell on other defects in her claim of title, it will be noticed that the deeds from Kingston to Fay, and from Solomon Smith to William Randall, each had but one subscribing witness. The former was excluded; the latter was admitted in evidence against objection. Neither of the deeds was entitled to be recorded, and could not be proven by the record as the last one was.

There are authorities which hold that the seizin of the plaintiff in any real action is proved, prima facie, by evidence of his actual possession under claim of title. *Ward's Heirs v. McIntosh*, 12 Ohio St. 231; *Gulf R.R. Co. v. Owen*, 8 Kan. 410. Prof. Greenleaf so states the rule. 2 Greenl. on Ev. § 555. See, also, *Rau v. M. V. R.R. Co.*, 13 Minn. 442; *St. P. & S. C. R.R. Co. v. Matthews*, 16 Minn. 341. That is, these facts afford presumptive evidence of seizin in fee simple, until the contrary appears. But that rule would not save the plaintiff's case, because she offered evidence which disproved or overcame the presumption arising from these facts. She was not content to show actual possession under claim of title, but she undertook to prove title and failed. The evidence was probably offered to prove an adverse possession, under paper title, for ten years. That would have been sufficient had she established the fact of such adverse possession for the requisite time. But she did not; so the question returns, Was not the plaintiff bound, under the circumstances, to prove her title? We think she was. For if she was not the owner of the premises, why should she recover damages for a permanent injury to them? She saw fit to put her title in issue, to rely upon it, and sought to recover as owner. The case is much like condemnation proceedings, and should be governed by the same rule as to proof of title. Since the early case of *Robbins v. M. & H. R.R. Co.*, 6 Wis. 636, it has been understood that the plaintiff must show title, and that title will not be presumed from evidence of possession under claim of title.

NOTE. — Other authorities to the effect that a mere possessor of land cannot recover damages for a permanent injury to it are *Waltmeyer v. Wisconsin Ry. Co.*, 71 Iowa, 626; *Anderson v. Thunder Bay River Boom Co.*, 57 Mich. 216; *Kelly v. New York Ry. Co.*, 81 N.Y. 233; *Frisbee v. Marshall*, 122 N.C. 760, 765; *International Ry. Co. v. Ragsdale*, 67 Tex. 24, 28.

## ANDERSON v. GOULDBERG.

51 Minn. 294. 1892.

APPEAL by defendants, Hans J. Gouldberg and D. O. Anderson, from an order of the District Court of Isanti County, LOCHREN, J., made November 14, 1892, refusing a new trial.

This action was brought by the plaintiff, Sigfrid Anderson, against the defendants, partners as Gouldberg & Anderson, to recover the possession of ninety-three pine logs, marked L S X, or for the value thereof. Plaintiff claimed to have cut the logs on section 22, township 27, range 25, Isanti County, in the winter of 1889-1890, and to have hauled them to a mill on section 6, from which place defendants took them. The title to section 22 was in strangers, and plaintiff showed no authority from the owners to cut logs thereon. Defendants claimed that the logs were cut on section 26, in the adjoining township, on land belonging to the Ann River Logging Company, and that they took the logs by direction of the Logging Company, who were the owners. The court charged that even if plaintiff got possession of the logs as a trespasser his title would be good as against any one except the real owner or some one who had authority from the owner to take them, and left the case to the jury on the question as to whether the logs were cut on the land of the Logging Company, and taken by defendants under its authority. The jury found a verdict for the plaintiff and assessed his damages at \$153.45. From an order denying their motion for a new trial, defendants appeal.

MITCHELL, J. It is settled by the verdict of the jury that the logs in controversy were not cut upon the land of the defendants, and consequently that they were entire strangers to the property.

For the purposes of this appeal, we must also assume the fact to be (as there was evidence from which the jury might have so found) that the plaintiffs obtained possession of the logs in the first instance by trespassing upon the land of some third party.

Therefore the only question is whether bare possession of property, though wrongfully obtained, is sufficient title to enable the party enjoying it to maintain replevin against a mere stranger, who takes it from him. We had supposed that this was settled in the affirmative as long ago, at least, as the early case of *Armory v. Delamirie*, 1 Strange, 505, so often cited on that point.

When it is said that to maintain replevin the plaintiff's possession must have been lawful, it means merely that it must have been lawful as against the person who deprived him of it; and possession is good title against all the world except those having a better title.

Counsel says that possession only raises a presumption of title, which, however, may be rebutted. Rightly understood, this is correct; but counsel misapplies it. One who takes property from the

possession of another can only rebut this presumption by showing a superior title in himself, or in some way connecting himself with one who has. One who has acquired the possession of property, whether by finding, bailment, or by mere tort, has a right to retain that possession as against a mere wrongdoer who is a stranger to the property. Any other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner.

*Order affirmed.*

NOTE. — See, *accord*, *Odd Fellows Hall Association v. McAllister*, 153 Mass. 292, 295; *Sanford v. Millikin*, 144 Mich. 311; *Freshwater v. Nichols*, 7 Jones (N.C.), 251; *Lewis v. Birdsey*, 19 Oreg. 164, 170. But *cf.* *Chambers v. Hunt*, 3 Harrison (N.J.), 339.

## BOOK II.

### SOME METHODS OF ACQUIRING TITLE TO CHATTELS.

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#### NOTE.

THE subject of acquiring title to chattels may profitably be divided into three parts: (1) the acquisition of title to chattels having no former owner; (2) the acquisition of title to chattels having a former owner, regardless of his consent; and (3) the acquisition of title to chattels having a former owner, with his consent.

Only a few of the many methods of acquiring title to chattels are here considered.

The acquisition of title to chattels having no former owner is illustrated by the acquisition of title to wild animals. But such title is acquired by reducing the animal to possession, and what amounts to a reduction to possession has already been considered.

Certain methods of acquiring title to chattels having a former owner, regardless of his consent, are considered in detail in chapters one to six, inclusive, in this book.

Of course the title to chattels having a former owner is usually acquired by some method involving his consent. The law as to sales of personal property, and mortgages of personal property, and as to the disposition of the property of deceased persons is considered in other courses given in this Law School. The law as to gifts, *inter vivos*, is considered in chapter seven, of this book. The distinction between a sale and a bailment is considered in chapter eight of this book.

## CHAPTER I.

## A BONA FIDE PURCHASE.

## CLAYTON v. LE ROY.

[1911.] 2 K. B. 1031.

A WATCH belonging to the plaintiff was stolen, and was afterwards sold to a person who purchased it in good faith. The watch eventually came into the hands of the defendant, and the plaintiff demanded it.

SCRUTTON, J. By the common law of England, before it was modified by the incorporation of a rule of the law merchant, a person in possession of goods could not confer on another either by sale or pledge any better title to the goods than he himself had. It follows that if the goods had been stolen, even the twentieth innocent purchaser might find himself deprived of them by the original owner. This was old German law as well, but its strictness put a fetter upon sales in the great fairs and markets in which much of the mercantile business of the time was transacted. In the eleventh century an early German writer says that "merchants assert that sales made in fairs, whether made with proper legal forms or not, should be binding since it is their custom." By the foreign customs sometimes the real owner could get his property back by paying the merchant who had bought in a fair the price he had paid for it; sometimes he could not recover it at all, if it had been bought in an open market. In England by the common law as stated by Bracton (f. 151), if the person in possession could not produce the person who sold to him to warrant the sale, yet, if he bought publicly in a fair or market, though he lost his goods on claim by the true owner, he was free from an action of theft. But in a case in the St. Ives fair roll of 1291 Mathilda Frances was allowed to keep stolen malt on proving she had bought it in good faith in the precincts of the fair. Gradually, by steps which I fear are now untraceable, the rule of the law merchant protecting sales in market overt became incorporated as an exception on the strict common law and recognized by the King's Courts; and now s. 22 of the Sale of Goods Act, 1893, provides that "Where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." The exception

generally only applies to a public legal recognized fair or market. Thus in *Lee v. Bayes*, (1856) 18 C. B. 599, where a horse was sold by public auction in a horse repository in Southwark, no protection was given to the purchaser, because the sale was not in an open public and legally constituted market. See also *Marner v. Banks*, (1867) 17 L. T. 147. But local customs might carry the protection further. "The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt." Blackstone, Comm., vol. 2, p. 449. But in some towns their customs may extend the protection to sales outside a recognized market. The city of London is one of these favoured localities.

NOTE. — The case contains a discussion, valuable for the English lawyer, as to what amounts to a sale in *market overt*. It was held by SCRUTTON, J., that the sale in question had not been in *market overt*.

"Under the statutes giving restitution of stolen goods after conviction of the thief on indictment, the ownership of the goods is effectually re-vested in the party robbed after the thief's conviction, notwithstanding any intermediate sale in market overt." Williams on Personal Property, 17th ed., p. 15.

A bona fide purchaser may be protected by the provisions of a statute, irrespective of the purchase being made in market overt. See the Factors Act, Stat. 52 & 53 Vict. c. 45.

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### WHEELWRIGHT v. DEPEYSTER.

1 Johns. (N.Y.) 471. 1806

SOME coffee, belonging to American citizens, was taken by strangers to St. Jago de Cuba, and there sold to persons who purchased in good faith. This sale was held not to divest the title of the owners.

KENT, C.J., delivered the opinion of the court.

It was contended, that a *bona fide* purchase by the defendants at St. Jago, for a valuable consideration, and without notice, was equivalent to a purchase in *market-overt* under the English law, and bound the property against the party who had right. As no local law is alleged, or proved, this question must be governed by the general principles of the law of sales, which we are to presume, until the contrary be shown, are received and adopted in all commercial countries, at St. Jago, as well as at New York. It was the maxim of the civil law that *nemo plus juris in alium transferre potest quam ipse habet*; and this plain dictate of common sense is considered by Pothier and Erskine as a fundamental doctrine of the contract of sale in France and Scotland; and there is good reason to conclude, that it prevails

in most of the countries in Europe, which have felt the influence, or obeyed the precepts of the civil law. Lord KAIMES, in his *Historical Law Tracts*, tit. "History of Property," vindicates this principle in the transfer of chattels, and observes, that when notions of property were slight, a bona fide purchase of stolen goods gave a good title against the original owner; but that in the progress of society, property acquired such stability and energy as to affect the subject wherever found, and to exclude even an honest purchaser, when the title of his vendor was discovered to be defective. It was also a principle in the English common law, that a sale out of market-overt did not change the property against the rightful owner, and the custom of the city of London, which forms an exception to the general rule, has always been regarded and restricted by the courts, with unusual jealousy and vigilance. (Comyn's Dig. tit. market E.) The effect of such a purchase made here is not strictly before us, but I have no difficulty in saying, that I know of no usage or regulation within this state, no Saxon institution of *markets-overt*, which controuls or interferes with the application of the common law. The purchase by the defendants did not, therefore, of itself, and without reference to the title of the vendor, give them an indefeasible right to the goods in question.

NOTE. — See, *accord*, *Robinson v. Haas*, 40 Cal. 474; *Fawcett v. Osborn*, 32 Ill. 411, 424; *Dame v. Baldwin*, 8 Mass. 518; *Ketchum v. Brennan*, 53 Miss. 596, 607; *Black v. Jones*, 64 N.C. 318; *Roland v. Gundy*, 5 Ohio, 202; *Quinn v. Davis*, 78 Pa. 15; *Heacock v. Walker*, 1 Tyler (Vt.), 338; *Ventress v. Smith*, 10 Pet. (U.S.) 161, 175.

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MILLER v. RACE.

1 Burr. 452. 1758.

IT was an action of trover against the defendant, upon a bank-note, for the payment of twenty-one pounds ten shillings to one William Finney, or bearer, on demand.

The cause came on to be tried before Lord MANSFIELD, at the sittings in Trinity term last at Guildhall, London: and upon the trial it appeared that William Finney, being possessed of this bank-note on the 11th of December, 1756, sent it by the general post, under cover, directed to one Bernard Odenharty at Chipping Norton in Oxfordshire; that on the same night, the mail was robbed, and the bank-note in question (amongst other notes) taken and carried away by the robber; that this bank-note, on the 12th of the same December, came into the hands and possession of the plaintiff, for a full and valuable consideration, and in the usual course and way of



his business, and without any notice or knowledge of this bank-note being taken out of the mail.

It was admitted and agreed, that, in the common and known course of trade, bank-notes are paid by and received of the holder or possessor of them, as cash; and that in the usual way of negotiating bank-notes, they pass from one person to another as cash, by delivery only, and without any further inquiry or evidence of title, than what arises from the possession. It appeared, that Mr. Finney, having notice of this robbery, on the 13th of December, applied to the Bank of England "to stop the payment of this note": which was ordered accordingly, upon Mr. Finney's entering into proper security "to indemnify the Bank."

Some little time after this, the plaintiff applied to the Bank for the payment of this note; and, for that purpose, delivered the note to the defendant, who is a clerk in the Bank: but the defendant refused either to pay the note, or to redeliver it to the plaintiff. Upon which this action was brought against the defendant.

The jury found a verdict for the plaintiff, and the sum of 21l. 10s. damages; subject nevertheless to the opinion of this Court upon this question — "Whether, under the circumstances of this case, the plaintiff had a sufficient property in this bank-note to entitle him to recover in the present action?"

Lord MANSFIELD now delivered the resolution of the Court.

After stating the case at large, he declared, that at the trial he had no sort of doubt but that this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce: which would be much incommoded by a contrary determination.

It has been very ingeniously argued by Sir Richard Lloyd, for the defendant. But the whole fallacy of the argument turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

Now, they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash.

They pass by a will, which bequeaths all the testator's money or cash; and are never considered as securities for money, but as money itself. Upon Ld. Ailesbury's will, 900l. in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

So, on bankruptcies, they cannot be followed as identical and distinguishable from money: but are always considered as money or cash.

'T is pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench; and mistake their meaning. It has been quaintly said, "that the reason why money cannot be followed is, because it has no ear-mark:" but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency. So in case of money stolen, the true owner cannot recover it; after it has been paid away fairly and honestly upon a valuable and bona fide consideration: but before money has passed in currency, an action may be brought for the money itself. There was a case in 1 G. 1, at the sittings, *Thomas v. Whip*, before Ld. MACCLESFIELD; which was an action upon assumpsit, by an administrator against the defendant, for money had and received to his use. The defendant was nurse to the intestate during his sickness; and being alone, conveyed away the money. And Ld. MACCLESFIELD held that the action lay. Now this must be esteemed a finding at least.

Apply this to the case of a bank-note. An action may lie against the finder, it is true (and it is not at all denied); but not after it has been paid away in currency. And this point has been determined even in the infancy of bank-notes: for 1 Salk. 126. M. 10 W. 3. at *nisi prius*, is in point. And Ld. Ch. J. HOLT there says, that it is "by reason of the course of trade; which creates a property in the assignee or bearer." (And "the bearer" is a more proper expression than assignee.)

Here an inn-keeper took it, *bona fide*, in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber: for this matter was strictly inquired and examined into at the trial; and is so stated in the case, "that he took it for a full and valuable consideration, in the usual course of business." Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1000*l.* it might have been suspicious: but this was a small note, for 21*l.* 10*s.* only: and money given in exchange for it.

Another case cited was a loose note in 1 Ld. Raym. 738, ruled by Ld. Ch. J. HOLT at Guildhall, in 1698; which proves nothing for the defendant's side of the question: but it is exactly agreeable to what is laid down by my Ld. Ch. J. HOLT, in the case I have just mentioned. The action did not lie against the assignee of the bank-bill; because he had it for valuable consideration.

In that case he had it from the person who found it: but the action did not lie against him, because he took it in the course of currency; and therefore it could not be followed in his hands. It never shall

be followed into the hands of a person who *bona fide* took it in the course of currency, and in the way of his business.

The case of *Ford v. Hopkins* was also cited: which was in Hil. 12 W. 3. coram HOLT, Ch. J., at *nisi prius*, at Guildhall; and was an action of trover for million-lottery tickets. But this must be a very incorrect report of that case: it is impossible that it can be a true representation of what Ld. Ch. J. HOLT said. It represents him as speaking of bank-notes, exchequer-notes, and million-lottery tickets, as like to each other. Now no two things can be more unlike to each other than a lottery-ticket and a bank-note. Lottery-tickets are identical and specific: specific actions lie for them. They may prove extremely unequal in value: one may be a prize; another a blank. Land is not more specific than lottery-tickets are. It is there said, "that the delivery of the plaintiff's tickets to the defendant, as that case was, was no change of property." And most clearly it was no change of the property: so far the case is right. But it is here urged as a proof "that the true owner may follow a stolen bank-note, into what hands soever it shall come."

Now the whole of that case turns upon the throwing in bank-notes, as being like to lottery-tickets.

But Ld. Ch. J. HOLT could never say "that an action would lie against the person who, for a valuable consideration, had received a bank-note which had been stolen or lost, and *bona fide* paid to him:" even though the action was brought by the true owner: because he had determined otherwise, but two years before; and because bank-notes are not like lottery-tickets, but money.

The person who took down this case, certainly misunderstood Lord Ch. J. HOLT, or mistook his reasons. For this reasoning would prove (if it was true, as the reporter represents it), that if a man paid to a goldsmith 500*l.* in bank-notes, the goldsmith could never pay them away.

A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received as cash: and it is necessary, for the purposes of commerce, that their currency should be established and secured.

There was a case in the Court of Chancery, on some of Mr. Child's notes, payable to the person to whom they were given, or bearer. The notes had been lost or destroyed many years. Mr. Child was ready to pay them to the widow and administratrix of the person to whom they were made payable; upon her giving bond, with two responsible sureties (as is the custom in such cases), to indemnify him against the bearer, if the notes should ever be demanded. The administratrix brought a bill; which was dismissed, because she either could not, or would not, give the security required. No dispute ought to be made with the bearer of a cash-note; in regard to commerce, and for the sake of the credit of these notes: though

it may be both reasonable and customary, to stay the payment, till inquiry can be made, whether the bearer of the note came by it fairly or not.

Lord MANSFIELD declared that the Court were all of the same opinion for the plaintiff; and that Mr. Just. WILMOT concurred.

RULE — that the *postea* be delivered to the plaintiff.

NOTE. — The law in the United States is in accord.

The same principle governs transactions in promissory notes, bills of exchange, and checks, indorsed in blank or payable to bearer, and also bonds, payable to bearer.

In *Moss v. Hancock*, [1899] 2 Q. B. 111, a coin, which was current coin of the realm, was stolen and sold as a curiosity to a person who purchased it in good faith. The owner was held entitled to it, after the conviction of the thief.

#### NOTE.

Although a *bona fide* purchase will not supply legal defects (with the qualifications shown by the cases given above), it is fundamental that it will cut off equitable rights.

## CHAPTER II.

## A PURCHASE AT A SALE IN JUDICIAL PROCEEDINGS.

## GRIFFITH v. FOWLER.

18 Vt. 390. 1846.

TRESPASS for taking a shearing machine. The case was submitted upon a statement of facts, agreed to by the parties, from which it appeared, that in 1836 the defendant, being the owner of the machine in question, lent it to one Freeman, to use in his business as a clothier, who was to pay a yearly rent therefor, and in whose possession it remained until the year 1841, when it was sold at sheriff's sale, on execution, as the property of Freeman, and one Richmond became the purchaser; that Richmond, in January, 1842, sold the machine to the plaintiff, who at the same time purchased of Freeman the building, in which the machine was situated, and took possession thereof; and that the defendant, in February, 1842, took the machine from the plaintiff's possession, claiming it as his property. The value of the machine was admitted to be fifty dollars.

Upon these facts the county court — HEBARD, J., presiding — rendered judgment for the defendant. Exceptions by plaintiff.

The opinion of the court was delivered by

REDFIELD, J. The only question reserved in this case is, whether a title to personal property, acquired by purchase at sheriff's sale, is absolute and indefeasible against all the world, or whether such sale only conveys the title of the debtor.

There has long been an opinion, very general, I think, in this state, not only among the profession, but the people, that a purchaser at sheriff's sale acquires a good title, without reference to that of the debtor; that such a sale, like one in *market overt* in England, conveys an absolute title. But, upon examination, I am satisfied that this opinion acts upon no good basis.

So far as can now be ascertained, this opinion, in this state, rests mainly upon a dictum in the case of Heacock v. Walker, 1 Tyl. 338. There are many reasons why this *dictum* should not be regarded, if the matter were strictly *res integra*. It was a declaration of the chief justice in charging the jury. Cases were then tried by the jury at the bar of this court, as matter of right, and in course, and before the law of the case had been discussed and settled by the court. In all these respects these trials differed essentially from

jury trials at the bar of the higher courts in Westminster Hall. Such trials, there, being only matter of favor, granted in the most important cases, and after the law of the cases has been fully discussed, and settled by the court.

The law given to the jury, in the two cases, will of course partake something of the character of the respective form and deliberation of the trials. Under our former practice, law laid down in the course of a jury trial, unless when questions were reserved and farther discussed upon motions for new trials, was not much esteemed, even when it was upon the very point in dispute. But especially, the *dicta* of the judge, who tried the case, and who must, of necessity, somewhat amplify the bare text of the law, in order to show the jury the reason upon which it was based, could not be esteemed, as anything more than the hastily formed opinion of the judge — mere argument, to satisfy some possible, or apprehended, doubt of the jury in regard to the soundness of the main proposition laid down. Such was the *dictum* referred to. That which was said of Chief Justice TILGHMAN, of Pennsylvania, is undoubtedly good praise, when said of any judge: — “He made no *dicta*, and he regarded none.” There are sufficient reasons why the *dictum* should not be regarded, if the thing were new. And we do not esteem the long standing of the *dictum* of any importance, unless it can be shown, that it has thus grown into a generally received and established law or usage; which, we think, is not the case in regard to this. For this court has, within the last ten years, repeatedly held, that a sheriff's sale was of no validity to pass any but the title of the debtor, when no actual delivery of the thing sold was made by the sheriff, at the time of sale. *Austin v. Tilden et al.*, 14 Vt. 325; *Boynton v. Kelsey*, Caledonia County, 1836. *S. P.*, Lamoille County, 1841. Since the first of these cases was decided, the main question involved in this case has been considered doubtful in this state, and we now feel at liberty to decide it, as we think the law should be, that is, as it is settled at common law.

But the idea, that some analogy existed between a sheriff's sale and a sale in *market overt* is certainly not peculiar to the late Chief Justice TYLER. This opinion seems at one time to have prevailed in Westminster Hall, to some extent, at least; for in the case of *Farrant v. Thompson*, 5 B. & A. 826 [7 E. C. L. 272], which was decided in the King's Bench in 1822, nearly twenty years later than that of *Heacock v. Walker*, one of the points raised in the trial of the case before Chief Justice ABBOTT was, that the title of the purchaser, being acquired at sheriff's sale, was good against all the world, *the same as that of a purchaser in market overt*. This point was overruled, and a verdict passed for the plaintiff, but with leave to move to set it aside, and to enter a nonsuit, upon this same ground, with one other. This point was expressly argued by Sir James

Scarlet, — who was certainly one of the most eminent counsel, and one of the most discriminating men of modern times, — in the King's Bench, and was decided by the court not to be well taken. Since that time I do not find that the question has been raised there.

It seems to be considered in Massachusetts, and in New York, and in many of the other states, that nothing, analogous to *markets overt* in England, exists in this country. *Dame v. Baldwin*, 8 Mass. 518. *Wheelwright v. DePeyster*, 1 Johns. 480. 2 Kent, 324, and cases there cited. Nothing of that kind, surely, exists in this state, unless it be a sheriff's sale. And if the practice of holding sales in *market overt* conclusive upon the title existed in any of the states, it would be readily known. I conclude, therefore, that Chancellor Kent is well founded in his opinion, when he affirms that the law of *markets overt* does not exist in this country. *Ib.*

It seems probable to me, that the idea of the conclusiveness of a sheriff's sale upon the title is derived from the effect of sales under condemnations in the exchequer, for violations of the excise or revenue laws, and sales in prize cases, in the admiralty courts, either provisionally, or after condemnation. But these cases bear but a slight analogy to sheriff's sales in this country or in England. Those sales are strictly judicial, and are merely carrying into specific execution a decree of the court *in rem*, which, by universal consent, binds the whole world.

Something very similar to this exists, in practice, in those countries which are governed by the civil law; which is the fact in one of the American states, and in the provinces of Canada, and in most, if not all, the continental states of Europe. The property, or what is claimed to be the property, of the debtor is seized and libelled for sale, and a general monition served, notifying all having adversary claims to interpose them before the court, by a certain day limited. In this respect the proceedings are similar to proceedings in prize courts, and in all other courts proceeding *in rem*. If no claim is interposed, the property is condemned, by default, and sold; if such claims are made, they are contested, and settled by the judgment of the court, and the rights of property in the thing are thus conclusively settled *before the sale*.

But with us nothing of this character exists in regard to sheriff's sales. Even the right to summon a jury to inquire into conflicting claims *de bene esse*, as it is called in England, and in the American states, where it exists, has never been resorted to in this state. And in England, where such a proceeding is common, — *Impey*, 153; *Dalton*, 146; *Farr et al. v. Newman et al.*, 4 T. R. 621, — it does not avail the sheriff, even, except to excuse him from exemplary damages. *Latkow v. Eamer*, 2 H. Bl. 437; *Glassop v. Poole*, 3 M. & S. 175. It is plain, then, that a sheriff's sale is not a judicial sale. If it were,

no action could be brought against the sheriff, for selling upon execution property not belonging to the debtor.

With us an execution is defined to be the putting one in possession of that which he has already acquired by judgment of law. Co. Lit. 154 a. (Thomas' Ed. 405.) But the judgment is of a sum *in gross* "to be levied of the goods and chattels of the debtor," which the sheriff is to find *at his peril*. The sale upon the execution is only a transfer, by operation of law, of what the debtor might himself transfer. It is a principle of the law of property, as old as the Institutes of Justinian, *Ut nemo plus juris in alium transferre potest, quam ipse habet*.

The comparison of sheriff's sales to the sale of goods lost, or estrays, in pursuance of statutory provisions, which exist in many of the states, does not, in my opinion, at all hold good. Those sales undoubtedly transfer the title to the thing, as against all claims of antecedent property in any one, if the statutory provisions are strictly complied with; but that is in the nature of a forfeiture, and is strictly a proceeding *in rem*, wherein the finder of the lost goods is constituted the *tribunal of condemnation*.

There being, then, no ground, upon which we think we shall be justified in giving to a sheriff's sale the effect to convey to the purchaser any greater title than that of the debtor, the judgment of the court below is affirmed.



### CHAPTER III.

#### STATUTES OF LIMITATIONS.

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#### CHAPIN v. FREELAND.

142 Mass. 383. 1886.

REPLEVIN of two counters. Writ dated November 14, 1881. Trial in the Superior Court, without a jury, before BLODGETT, J., who allowed a bill of exceptions, in substance as follows:—

There was evidence tending to show, and the judge found, that, in 1867, one Daniel Warner built a building upon his land in Oxford, and fitted up the same with shelving and counters, and designed the same for use as a store for the sale of general merchandise; that the counters in controversy were put into the store by him, and were arranged for convenient use therein; that the same were nailed to the floor, and were used in said building; that on January 2, 1871, Warner mortgaged the premises to Alexander De Witt; that DeWitt died in 1879, and Charles A. Angell and William Newton were appointed executors of his will; that in April, 1879, said executors foreclosed said mortgage by sale, under the power contained therein, and became the purchasers of the premises; that, soon after such sale, Warner removed the counters from the building, and the executors regained possession of them, and put them upon the premises, but did not nail or fasten them to the premises; that afterwards the executors sold the premises to the plaintiffs, but did not make mention of the counters in their deed, nor speak of them in the sale; and that the defendant took the counters from the premises occupied by the plaintiffs in 1881.

The defendant offered evidence tending to show, and the judge found, that she purchased these counters, with two others, in 1861; that they were built in Worcester and sent to her complete at Oxford, and placed in her store; that they were heavy counters with black-walnut tops and heavy bases, with panelled front, supported by standards standing upon the floor, and were not fastened to the floor, but were kept in position by their own weight, and were used there until some time in 1866, when, the store being then occupied by a tenant, they were set on one side as not being adapted to the business for which such store was then used, and finally, with the knowledge and consent of DeWitt, were moved out of the building on to the street, and placed one upon the other; that Warner took the

counters from their place in the street, and put them in his store, as aforesaid; that there were two mortgages on the defendant's store premises given some time previously to November 26, 1866, which were assigned to DeWitt on that day; that from that date, by agreement with the defendant, DeWitt, who was the defendant's brother, had charge of said estate and of said counters for the defendant; that she never authorized him, or any other person, to dispose of the counters, and never herself parted with her property in them; that, soon after the counters were removed from her store, she missed them, and made inquiries for them, but failed to find them; and that, when she learned that they were upon the plaintiffs' premises, she took them away.

There was no other evidence than as above stated as to the means of the defendant of obtaining information as to where the counters were after they were taken from her store, or as to any concealment of the taking of the counters by Warner. It was in evidence, however, that the defendant, after 1861, resided some of the time in Oxford and some of the time in Sutton.

There was no evidence, except as before stated, tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter; and there was no other material evidence in the case applying to the rulings made or asked for at the trial.

The plaintiffs asked the judge to rule as follows: "1. Upon the evidence, the counters, though attached to the store by one who had no title to them, became fixtures and a part of the realty, and passed to the mortgagee, and to the purchasers at the foreclosure sale, and came rightfully into the possession of the plaintiffs when they purchased the premises, as belonging thereto, though not then nailed to the building. 2. The defendant had lost the right to take the counters, if Warner had no right or title to them when he so took and attached them to the store building, such taking being a tort, and, as a cause of action, barred by the statute of limitations long before the defendant removed them in 1881, and therefore having no right to recover them, and nothing appearing sufficient to take the case out of the statute. 3. Upon the evidence and facts, as before stated, the plaintiffs, as matter of law, were entitled to maintain their action, and the facts in the case would not warrant a finding for the defendant."

The judge declined to rule as requested; and found for the defendant. The plaintiffs alleged exceptions.

HOLMES, J. This is an action of replevin for two counters. There was evidence that they belonged to the defendant in 1867, when one Warner built a shop, put the counters in, nailed them to the floor, and afterwards, on January 2, 1871, mortgaged the premises to one DeWitt. In April, 1879, DeWitt's executors foreclosed, and

sold the premises to the plaintiffs. The defendant took the counters from the plaintiffs' possession in 1881. The court found for the defendant. Considering the bill of exceptions as a whole, we do not understand this general finding to have gone on the ground either of a special finding that the counters remained chattels for all purposes, and were not covered by the mortgage, *Carpenter v. Walker*, 140 Mass. 416, or that there was a fraudulent concealment of the cause of action, within the Gen. Sts. c. 155, § 12 (Pub. Sts. c. 197, § 14). But we understand the court to have ruled or assumed that, although the statute should have run in favor of Warner or DeWitt before the transfer to the plaintiffs, that circumstance would not prevent the defendant from taking possession if she could, or entitle the plaintiffs to sue her for doing so, if she was the original owner.

A majority of the court are of opinion that this is not the law, and that there must be a new trial. We do not forget all that has been said and decided as to the statute of limitations going only to the remedy, especially in cases of contract. We do not even find it necessary to express an opinion as to what would be the effect of a statute like ours, if a chattel, after having been held adversely for six years, were taken into another jurisdiction by the originally wrongful possessor, although all the decisions and dicta, so far as we know, agree that the title would be deemed to have passed. *Cockfield v. Hudson*, 1 Brev. 311. *Howell v. Hair*, 15 Ala. 194. *Jones v. Jones*, 18 Ala. 248, 253. *Clark v. Slaughter*, 34 Miss. 65. *Winburn v. Cochran*, 9 Tex. 123. *Preston v. Briggs*, 16 Vt. 124, 130. *Baker v. Chase*, 55 N.H. 61, 63. *Campbell v. Holt*, 115 U.S. 620, 623. What we do decide is, that, where the statute would be a bar to a direct proceeding by the original owner, it cannot be defeated by indirection within the jurisdiction where it is law. If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea.

It is true that the statute, in terms, only limits the bringing of an action. But whatever importance may be attached to that ancient form of words, the principle we lay down seems to us a necessary consequence of the enactment. And a similar doctrine has been applied to the statute of frauds. *Carrington v. Roots*, 2 M. & W. 248. See *King v. Welcome*, 5 Gray, 41.

As we understand the statutory period to have run before the plaintiffs acquired the counters, we do not deem it necessary to consider what would be the law if the plaintiffs had purchased or taken the counters, within six years of the original conversion, from the person who first converted them, and the defendant had taken them after the action against the first taker had been barred, but within six years of the plaintiffs' acquiring them. We regard a purchaser from one against whom the remedy is already barred as entitled to

stand in as good a position as his vendor. Whether a second wrongful taker would stand differently, because not privy in title, we need not discuss. See *Leonard v. Leonard*, 7 Allen, 277; *Sawyer v. Kendall*, 10 Cush. 241; *Norcross v. James*, 140 Mass. 188, 189; Co. Lit. 114 b, 121 b.

*Exceptions sustained.*

FIELD, J. I am unable to assent to the opinion of the court. As the case was tried without a jury, and the court found generally for the defendant, the only questions of law are those raised by the plaintiffs' requests for rulings, which were refused. The plaintiffs must prevail, if at all, upon their own title or right of possession. There was evidence that the defendant purchased the counters in 1861, and placed them in her store, where they were used until some time in 1866, when, with the knowledge and consent of DeWitt, the defendant's brother, they were moved out of the building to the street; that DeWitt, from November 26, 1866, held a mortgage upon the defendant's "store premises," and "from that date, by agreement with the defendant, had charge of said estate and of said counters"; that, in 1867, Daniel Warner took the counters, without the defendant's knowledge or authority, and put them into his store, and nailed them to the floor, and mortgaged his premises to DeWitt on January 2, 1871; that DeWitt died in 1879, and this mortgage was foreclosed by a sale made by the executors of DeWitt's estate to themselves in April, 1879, and they afterwards "sold the premises to the plaintiffs," not mentioning the counters in their deed; that the defendant, "soon after the counters were removed from her store, missed them, and made inquiries for them, but failed to find them; and that, when she learned that they were upon the plaintiffs' premises, she took them away," in 1881, and retained possession until the plaintiffs replevied them. "There was no evidence, except as before stated [in the exceptions], tending to show what interest, if any, Warner claimed to have in the counters at the time they came into his possession, or at any time thereafter." From the time Warner took the counters until he mortgaged his premises to De Witt, six years had not expired; but, if it be assumed that Warner remained in possession until the mortgage given by him was foreclosed by a sale, he held possession more than six years. The possession of the plaintiffs could not have been for a longer time than about two years. If DeWitt was in possession from the date of the mortgage to him until his death, this was more than six years; but there was evidence that he was the agent of the defendant to take charge of the counters. The terms of the mortgage and conveyance under which the plaintiffs claim are not set out, but it has been assumed that they conveyed whatever title, if any, Warner had in the counters. It is manifest that, as between landlord and tenant,

these counters would have been either furniture or trade fixtures, and that, if they were taken by Warner and affixed to his store tortiously, without the consent of the defendant, she could have retaken them. *Kimball v. Grand Lodge of Masons*, 131 Mass. 59; *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447; *Guthrie v. Jones*, 108 Mass. 191.

The rule that the title of personal property is lost by a wrongful conversion of it into some other species of property, or by making it a part of real estate, has its foundation in the impossibility or impracticability of tracing the property, or of severing it from the real estate; and when personal chattels are, without the consent of the owner, and without right, taken by another and affixed to real property, the title of the owner is not lost, unless the identity of the chattels has been destroyed, or they have been so affixed to the real property that it is impracticable to sever them. See *Wetherbee v. Green*, 22 Mich. 311; *Jewett v. Dringer*, 3 Stew. (N.J.) 291. I think that the first request, therefore, ought not to have been given.

As the plaintiffs first took possession of the counters as their own some time after the foreclosure of the mortgage in 1879, the statute of limitations would have been no defence to them if the defendant had brought trover against them in 1881, when she took possession of the counters; their only defence would have been title in themselves derived from their vendors, and this title rests ultimately upon the possession of Warner. The second request, as applicable to the case, is in effect that, if Warner took the counters tortiously, and kept them attached to his building more than six years, the defendant lost her right of property in the counters. It is not stated in the request, that Warner's possession, to effect a change of title, must have been either known to the defendant or open and notorious, and must have been under a claim of right; and that his possession was of this character is not necessarily to be inferred from the evidence. The effect of the statute of limitations of real actions upon the acquisition of title to real property is carefully discussed in Langdell on Eq. Pl. §§ 119 & seq. Our statute of limitations of real actions provides that "no person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or to make such entry first accrued, or within twenty years after he, or those from, by, or under whom he claims, have been seised or possessed of the premises, except as is hereinafter provided." Pub. Sts. c. 196, § 1. Gen. Sts. c. 154, § 1. Rev. Sts. c. 119, § 1. Sts. 1786, c. 13; 1807, c. 75. Commissioners' Notes to the Rev. Sts. c. 119. As writs of right and of formedon, and all writs of entry except those provided by the Pub. Sts. c. 134, were abolished by the Rev. Sts. c. 101, § 51, it follows that, with certain exceptions not necessary to be noticed, after a disseisin continued for twenty years, or in other words after twenty years from

the time when the right to bring a writ of entry or to enter upon the land first accrued, the former owner of a freehold can neither maintain any action to recover possession, nor enter upon the land, nor, without an entry, convey it; and as all remedy, either by action or by taking possession, is gone, his title is held to have been lost. The effect of the statute has been to extinguish the right, as well as to bar the remedy, and this is the construction given to the English St. of 3 & 4 Wm. IV. c. 27. Our statute of limitations of personal actions was taken from the St. of 21 Jac. I. c. 16, and this statute has been held not to extinguish the right, but only to bar the remedy. *Owen v. De Beauvoir*, 16 M. & W. 547; 5 Exch. 166. *Dawkins v. Penrhyn*, 6 Ch. D. 318; 4 App. Cas. 51. *Dundee Harbour v. Dougall*, 1 Macq. 317, 321. *In re Alison*, 11 Ch. D. 284.

Section 1 of the Pub. Sts. c. 197, declares: "The following actions shall be commenced within six years next after the cause of action accrues, and not afterwards . . . actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels." There is no statute, and no law, prohibiting the owner of personal chattels from peaceably taking possession of them whenever he may find them, and the technical law of seisin and disseisin was never applied to personal chattels. It is established in this Commonwealth that a debt barred by the statute of limitations of the place of the contract is not extinguished. The statute only bars the remedy by action within the jurisdiction where the defendant has resided during the statutory period. *Bulger v. Roche*, 11 Pick. 36. It was formerly contended that, if the parties to a contract had resided within the same jurisdiction so long a time that, under the statute of limitations there, the remedy by action was barred, this ought to be held everywhere to have extinguished the right of action, and thus to have extinguished the debt, especially if the residence was that of the place where the contract was made; and the courts of some jurisdictions so held. *Brown v. Parker*, 28 Wis. 21, 30. *Goodman v. Munks*, 8 Port. 84, which is overruled in *Jones v. Jones*, 18 Ala. 248. See *Le Roy v. Crowninshield*, 2 Mason, 151, 168. This view was, however, generally abandoned, and was never the law of this Commonwealth, of the English Courts, of the Supreme Court of the United States, or of the courts of most of the States. A distinction was made in some of the Southern States between debts and chattels; and, in suits for the recovery of slaves, it was held that adverse possession for the statutory period of limitations of personal actions created a title. In some of the decisions, it is said that the possession must be *bona fide*, and acquired without force or fraud, and must be peaceable and adverse. It was held, however, that where there had been successive purchases of a slave, the possession of the successive purchasers could not be tacked, so as to create a title by adverse possession, because each purchase, if the purchaser took possession, was a new conversion;

but such a title acquired by one person could be transferred to another. In some of these States, at the time of these decisions, it was also held that the statute of limitations of personal actions extinguished debts. *Cockfield v. Hudson*, 1 Brev. 311. *Howell v. Hair*, 15 Ala. 194. *Clark v. Slaughter*, 34 Miss. 65. *Winburn v. Cochran*, 9 Tex. 123. *Wells v. Ragland*, 1 Swan, 501. *Bryan v. Weems*, 29 Ala. 423. *Seay v. Bacon*, 4 Sneed, 99. *Bernard v. Chiles*, 7 Dana, 18. *Moffatt v. Buchanan*, 11 Humph. 369. *Newby v. Blakey*, 3 Hen. & M. 57. *Beadle v. Hunter*, 3 Strob. 331. See *Goodman v. Munks*, *ubi supra*.

In *Preston v. Briggs*, 16 Vt. 124, and *Baker v. Chase*, 55 N.H. 61, it was suggested that adverse possession of a chattel for six years transferred the title; but the cases did not require a determination of the question. In *Campbell v. Holt*, 115 U.S. 620, 623, there is an express declaration that "the weight of authority is in favor of the proposition that where one has had the peaceable, undisturbed, and open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title, a title superior to the latter, whose neglect to avail himself of his legal rights has lost him his title." The cases there cited are two of the slave cases which have been mentioned, and decisions of the Supreme Court of the United States relating to real property.

The law of the Supreme Court of the United States in regard to contracts was carefully stated in *Townsend v. Jemison*, 9 How. 407; and it was there held that, when the statute extinguished the right or title, and created a new one, this new right or title would be recognized by courts in other jurisdictions; but, if the statute only affected the remedy, the courts would afford the remedies provided by their own laws. Our decisions upon the effect of our statute of limitations upon debts or contracts uniformly hold that it affects only the remedy by action. *Bulger v. Roche*, *ubi supra*. *Thayer v. Mann*, 19 Pick. 535. *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

There is nothing in the statute which suggests any distinction between actions to recover chattels and actions to recover debts, and it does not purport to be a statute relating to the acquisition of title to property, but a statute prescribing the time within which certain actions shall be brought. There is not a trace to be found in our reports of the doctrine that possession of chattels for the statutory period of limitations for personal actions creates a title, and I can find no such doctrine in the English reports, or in the reports of a majority of the courts of the States of this country. The law concerning the acquisition of easements in real property by prescription, in its modern form, was established by the courts by adopting in part the Roman law, and by limiting the period of enjoyment necessary to create the right to the time required by statute for

bringing actions for the recovery of land. *Edson v. Munsell*, 16 Allen, 557.

A right of way may be acquired by repeated trespasses, if they are openly made under a claim of right, and are uninterrupted; but twenty years' user is required, although the limitation for actions of tort in the nature of trespass *quare clausum* is six years. It was inevitable, perhaps, that, if a title to land could be acquired by adverse possession, a privilege of easement in land should be acquired by adverse use. By the Pub. Sts. c. 197, § 14, if a person liable to an action "fraudulently conceals the cause of such action from the knowledge of the person entitled to bring the same, the action may be commenced at any time within six years after the person so entitled discovers that he has such cause of action." This section has been construed strictly. *Nudd v. Hamblin*, 8 Allen, 130. Under this section, if one man stole another man's watch and carried it on his person as watches are usually carried, it might be held that the thief fraudulently concealed the cause of action from the owner; but if the thief sold the watch to one who purchased it in good faith, and he carried it in his pocket, this could not be held to be a fraudulent concealment; and, if the statute of limitations transfers the title, the owner, at the end of six years, would lose the title to his watch, although he may not have known or been able to discover who had it. The possession of personal chattels, even although honestly held, is not always open and notorious, and if title to such chattels is to be acquired by possession, it ought to be by an adverse possession *bona fide* held under a claim of right, which was known to the owner, or so open and notorious that the owner ought to have known it. The second request does not assume, and it has not been found as a fact, that such was the nature of Warner's possession.

*Lamb v. Clark*, 5 Pick. 193, was assumpsit by an executor to recover money paid to the defendant by the makers of certain promissory notes which had been delivered, more than six years before the action was brought to the defendant as his property, by the plaintiff's testator, as the consideration of a conveyance of land by the defendant to the testator's wife. The plaintiff contended that there was a fraudulent combination between the defendant and the wife of the testator, whereby the testator had been defrauded of his property. It was conceded by the court, that an action of trover might have been brought at any time within six years after the defendant received the notes, and that such an action was barred by the statute of limitations. The plaintiff, however, was permitted to recover all sums of money received by the defendant from the makers of the notes within six years before the commencement of the action. If the expiration of the six years had transferred the title of the notes to the defendant, it is difficult to see how the action could have been maintained.



*Wilkinson v. Verity*, L. R. 6 C. P. 206, was detinue by the church wardens of All Saints against the vicar, who, in 1859, having the custody of the communion plate, sold it for old silver. The church wardens discovered this in 1870, and then made a demand. The defence was the statute of limitations, and that the conversion occurred when the defendant sold the plate. The court say: "If this had been an action for damages for the conversion of the plate, in which the demand and refusal would have been only evidence of a conversion, it would have been impossible to contend that the date of the conversion could be excluded, or to deny that the defence upon the statute was sustained. Nor could the ignorance of the plaintiffs or their predecessors have prevented its operation." But the court held that the plaintiffs could elect to sue the defendant in detinue upon his contract as bailee to deliver the plate on demand, and that "it is no answer for the bailee to say that he has incapacitated himself from complying with the lawful demand of the bailor."

These cases show that the statute of limitations of personal actions is construed with reference to the particular action brought, and indicate that there is no change of title in property, although the time for bringing an action of trover has expired. I think that the subject of the acquisition of title to personal chattels by adverse possession can best be dealt with by the Legislature, if it is thought necessary to establish such a rule of law; and that it was not the intention of our statute of limitations of personal actions to extinguish rights or titles.

There is much force in the suggestion, that, if the defendant could not have recovered the counters by action at the time she took possession, she ought not to be permitted to take them from the possession of the plaintiffs by force or fraud; but it is not found in the case that she took them by force or fraud, and the request does not assume this; and I think that the defendant, at the time she took possession, could have recovered these counters of the plaintiffs by action, as the statute of limitations did not begin to run in favor of the plaintiffs until they took possession, which was at least as late as 1879; and it is not found that the plaintiffs' vendors had any title which they could convey to the plaintiffs. I think the second and third requests ought not to have been given.

NOTE. — The weight of authority in the United States is that the adverse possessor of a chattel becomes its owner, after the lapse of the period within which the former owner might have sued for its recovery. *Grunewald Co. v. Copeland*, 131 Ala. 345; *Hicks v. Fluit*, 21 Ark. 463; *Southwestern R.R. Co. v. Atlantic R.R. Co.*, 53 Ga. 401; *Fears v. Sykes*, 35 Miss. 633; *Gregg v. Bigham*, 1 Hill, Law (S.C.), 299; *Connor v. Hawkins*, 71 Tex. 582; *Preston v. Briggs*, 16 Vt. 124;

*Thornburg v. Bowen*, 37 W.Va. 538, 543; *Campbell v. Holt*, 115 U.S. 620, 623.

But see *contra*, *Goodwin v. Morris*, 9 Oreg. 322.

In *Miller v. Dell*, [1891] 1 Q. B. 468, Lord Esher, M.R., said (p. 471): "The property in chattels, which are the subject-matter of this action, is not changed by the Statute of Limitations though more than six years may elapse, and if the rightful owner recovers them the other man cannot maintain an action against him in respect of them."

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DRAGOO v. COOPER.

9 Bush (Ky.), 629. 1873.

JUDGE LINDSAY delivered the opinion of the court.

This action was instituted by Cooper to recover from Dragoo a horse that had been stolen from the former on the 22d day of January, 1865. It is agreed that in May, 1865, a party in possession of the horse sold him to one W. R. Lewis, and that in November, 1867, Lewis sold and delivered him to Dragoo, who kept him up to the 28th of September, 1871, when the action for his recovery was commenced.

It is further agreed that Cooper lived in Breckinridge County, Kentucky, and that both Lewis and Dragoo resided in Nelson County, eighty miles distant from Cooper's residence; and that he did not know where his horse was nor who had him in possession until within a short time prior to the institution of this action; and that he had made diligent search for him from the time of his loss until he found him in possession of Dragoo.

It is not necessary to notice the prices paid for the horse by Lewis and Dragoo, as compared with his actual value, inasmuch as it is admitted that they acted in good faith.

Dragoo pleaded the statute of limitation, and the only question to be determined is, whether under the admitted facts this plea presented a bar to the action.

Section 2, article 3, chapter 63, Revised Statutes, provides that "actions for the taking, detaining, or injuring personal property, including actions for the specific recovery thereof, . . . shall be commenced within five years next after the cause of action accrued."

It is claimed that the statute does not apply, because Cooper did not know where his horse was nor who had him in possession, and hence could not sue.

Various acts upon the part of those against whom actions might be prosecuted are made to stop the running of the statute, by the provisions of article 4 of said chapter, such as departing from the state, absconding, or concealing one's self, or by other indirect means obstructing the prosecution of a suit.

In this case neither Lewis nor Dragoo did anything to obstruct Cooper in bringing or instituting his suit, and his misfortune of not being apprised as to the party or parties against whom his cause of action existed does not bring his case within either of the statutory exceptions. We are aware of no instance in which it has been held that ignorance of a party's rights will stop the statute from running against him. This court held otherwise in the recent case of *Kinnison v. Carpenter, &c.*, upon the authority of Angell on Limitations, pp. 68, 117, 298, and 21 Maine, 315.

Appellee further urges that his cause of action did not accrue against Dragoo until he (Dragoo) acquired possession of this horse, which was in November, 1867, less than five years before suit, and that Dragoo is not entitled to the benefit of the possession of his vendor Lewis.

In the case of *Shannon v. Kinney*, 1 Marshall, 4, which was a suit for the recovery of real property, this court held that to toll the right of entry the adverse possession need not continue all the time in one person, nor be held under the same title; and decided that, according to the literal import of the statute, the plaintiff could only enter upon the land within twenty years after his right of entry accrued, and consequently an adverse possession for that length of time would toll his right; and that it was a matter of indifference whether the possession had been held uniformly under one title or at different times under different titles, provided the claim of title was always adverse to the plaintiff. The same doctrine was recognized and enforced in the subsequent cases of *Hord v. Walton*, 2 Marshall, 621, and *Winn v. Wilhite*, 5 J. J. Marshall, 524.

The language of the statute of 1796, fixing the limitation in actions for the recovery of realty, is not essentially different from that of our present statute prescribing the time within which actions like this shall be commenced, and we perceive no valid reason why the rule of construction adopted in suits relating to realty shall not be applied in actions for the recovery of personalty. The statute of limitations is not merely a bar to the remedy; it takes away the right, and invests it in the party having adverse possession of a chattel the requisite length of time. (*Stanley v. Earl*, 5 Littell, 281.) And it cannot be material whether the adverse possession that destroys the owner's right has been in one or more persons, so that it has been continuous. Statutes limiting the period within which actions may be commenced are intended to quiet men's estates and to prevent litigation; and as the possession of personal property is *prima facie* evidence of ownership, they should not be too strictly construed against persons who in good faith purchase such property. Dragoo does not acquire title to the horse in controversy by reason of Lewis's purchase from the thief, who could have no title, but by virtue of the possession under claim of title continuing in himself

and Lewis for more than five years before the institution of the action.

The *dictum* in the case of *Buffington v. Ulen*, 7 Bush, 231, is not conclusive of the question here under consideration. This action is not for the conversion of the horse; and herein it differs from the case cited. Besides, in that case Buffington's vendor was entitled to keep the mare until demanded, and it was considered that there could be no conversion by any one having her in possession until the demand was made. In this case the conversion was complete so soon as Lewis took possession of the horse, with a claim of title adverse to that of Cooper, and an action therefor might have been instituted at once. (2 Hilliard on Torts, 246.)

The instructions given by the circuit court are inconsistent with the views herein expressed, consequently the judgment is reversed, and the cause remanded for a new trial upon principles consistent with this opinion.

NOTE. — See *accord*, *Bohannon v. Chapman*, 17 Ala. 696, 698; *Hicks v. Fluit*, 21 Ark. 463; *Shute v. Wade*, 5 Yerg. (Tenn.) 1, 12; *Thornburg v. Bowen*, 37 W.Va. 538, 543. Cf. *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369, and cases cited, in which the court was of opinion that the executor of an adverse possessor could not tack the period of possession by him to the period of possession by his testator.

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### BRYAN v. WEEMS.

29 Ala. 423. 1856.

ONE of the questions was whether the offspring of slaves, born while the slaves were adversely possessed, belonged to the adverse possessor so soon as the statutory period had run with respect to the mothers.

STONE, J. It will be seen that we have assimilated the complainant's right to relief in this case to the trustee's right to maintain detinue. If, at the time the bill in this case was filed, Green, the trustee, had instituted his action of detinue or trover for the slaves, against Sledge, the executor, the six years' statute, if pleaded, would have barred either action, not only as to the slaves bequeathed by the will, but also as to the offspring of the females, born after the adverse holding. *Morris v. Perregay*, 7 Gratt. 373; *White v. Martin*, 1 Porter, 215.

When defendant's right to property is established by a successful interposition of the plea of the statute of limitations, it relates back to the time of the first taking, and carries with it all the intermediate profits, and the increase of the females while in the adverse

possession of such defendant, unless, as to such increase, some act be done before the bar against recovery of the mother is perfected, which prevents the operation of this rule. Partus sequitur ventrem. To hold otherwise would lead to strange results in the case of female slaves. An adverse holding of six years would vest the title in the holder. During the time she was adversely held, she may, at intervals, have given birth to children; she and the children all the time remaining together, out of the possession of the claimant. She may have given birth to an infant within a very short time before the completion of the six years. According to the argument, all claim to the mother would be forfeited, while to bar the right to recover her child would require another period of near six years.

Another illustration may serve to present this argument in a stronger light. Suppose the property adversely held consist of domestic animals, who multiply at an early age, and rapidly. Before the six years expire, the females, in all probability, will have increased abundantly; and perhaps at no point of coming time, will there be a female that has reached the age of six years, without yielding her increase. If the offspring do not follow the mother as an incident, but each successive scion must itself be adversely held for the term of six years before the statute runs, unless, before its birth, the parent stock had existed and been adversely held for a like period, the entire interest of the former owner would not probably be extinguished in any conceivable number of years. This point was not raised in argument; but we have felt it our duty to notice it, as the court is not unanimous.

The decree of the chancellor is affirmed.

RICE, C.J. — There are many cases, in which the true owner of property, by *electing* a particular form of action, and prosecuting it to judgment and satisfaction, or by electing to sue for only part of an entire demand, has been held to have *waived* and lost his right to that full measure of redress to which he would otherwise have been entitled. Thus, if a female slave has been permanently converted, and the owner *elects* to bring trover for such conversion, and recovers her value, and receives satisfaction, he thereby *elects* to treat the conversion as a *purchase* by the person guilty of the conversion; and as soon as the judgment is satisfied, the title to the slave passes, by operation of law, to the defendant in the judgment, and *relates back* to the time of the conversion. Consequently, the children born of such slave *after the conversion*, and pending the suit for the conversion, become the property of the defendant in the suit, as soon as the owner of their mother accepts satisfaction of the judgment therein rendered. That result is worked out by the application of the doctrines of *election*, *waiver*, and *relation*. See *White v. Martin*, 1 Porter, 215; *Firemen's Ins. Co. v. Cochran*, 27 Ala. R. 228; *Wittick v. Traun*, *ib.* 562.

But those doctrines have no application to the present case; for the complainants have not *brought any former suit*, nor *done any act* which can be construed into an *election* or a *waiver*, or which can enable the defendant to invoke the doctrine of *relation*. They have been *merely passive*; and if they have lost their right to any of the slaves in controversy, it is *by mere force* of that part of the statute of limitations, which requires the owner of personal chattels adversely held to sue for them *within six years* after the commencement of the adverse possession.

The legal effect of that part of that statute is not, in my opinion, what my brethren have pronounced it to be in the opinion just delivered. They hold, that it bars the complainants as to slaves who were not six years old when this suit was commenced, and who had not been held adversely for six years, and who were born of a mother who had not been held adversely for six years at the time of their birth. I cannot assent to that position.

Where slavery exists, the children of a female slave belong to him who, at the time of their birth, was the general and absolute owner of their mother. The children born of her whilst she is in the possession of an adverse holder, but before the adverse holding has continued six years, are as completely the property of the person who, at the time of their birth, is the absolute owner of their mother, as if they had been born whilst she was in the actual possession of that absolute owner. The children born of her after the adverse holder has, by an adverse possession of six years, acquired the title to her, belong to the adverse holder. The statute of limitations has no effect whatever upon the title of the true owner to the mother, until she has been in the adverse possession of another for the full period of six years. *So far as that statute is concerned*, her children, as soon as they are born, are, in legal contemplation, as separate and distinct from her, as if in fact they were not in any wise related to her. Each child, as soon as born, is a personal chattel, separate and distinct from its mother, and from every other child. The detention of each child born before the mother has been adversely held for six years, is a new, separate, and distinct cause of action, which the true owner may enforce in a separate and distinct suit. — *Wittick v. Traun, supra*. The cause of action for the detention of a child could not possibly accrue before it was born. The statute of limitations does not commence running against a cause of action before it accrues. One separate and distinct cause of action is not barred by that statute, merely because another, which accrued at a different time, is barred. That statute does not give to the adverse possessor title to a slave which has neither been held adversely for six years, nor been born of a mother who had been held adversely for six years before its birth. In other words, to give title to a slave to an adverse possessor, under the statute of limitations, it is at least essential that the slave should have been held

adversely for six years, or should have been born of one who had been held adversely for six years prior to its birth. If a child is born before its mother has been held adversely for six years, it is legally impossible that the true owner can be barred as to the child, by the mere operation of the statute of limitations of six years, before the child is six years old. According to the opinion of my brethren, that statute may bar the owner, as to the child, before the child is three days old! They work out this strange result, by what seems to me a very plain misapplication of the doctrine of relation, and by overlooking the effect of the undeniable proposition, that the detention of each child born before the mother has been held adversely for six years, is in itself a cause of action, new, distinct, and different from that which arose from the detention of the mother. — *Ivey v. Owens*, 28 Ala. Rep. 641.

One illustration will be sufficient to demonstrate the unfitness of the application of the doctrine of relation to any case like the present: Suppose A. has held adversely, for four years, the female slave of B. At the end of the four years, and whilst adversely held, she gives birth to a child. When the child is one year old, B., the real owner of the mother and child, finds the child in the highway, takes it peaceably into his possession, and keeps it until after the six years' adverse possession of its mother has run out, and the title to her has thereby become vested in the adverse possessor. The adverse possessor, as soon as he has thus acquired title to the mother, brings detinue for the child against the owner who had taken the child in the highway as aforesaid! He invokes the doctrine of *relation*, and calls upon the court to apply the doctrine, and give him a judgment for the child. Would any court, upon such facts, think of applying the doctrine of *relation*, or giving to the adverse possessor a judgment for the child? If my brethren are right in their opinion, the adverse possessor would recover the child, upon the doctrine of *relation*. His title to the mother being clear, by adverse possession of *six years*, and the child having been born whilst his adverse possession was continuing, although it had continued only four years at the birth of the child; — the law, as laid down by my brethren, would give him the child, by making his title to the mother *relate back* to the commencement of the adverse possession.

Without saying anything as to other parts of the opinion of my brethren, I here record my dissent from the reasoning and conclusions attained by them.

## CHAPTER IV.

## ACCESSION.

Blackstone, Commentaries, Book II, p. 404.

THE doctrine of property arising from *accession* is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement: but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.

## DAVIS v. EASLEY.

13 Ill. 192. 1851.

REPLEVIN for a quantity of boards. The boards had been made from trees growing on land of which the plaintiff claimed to be owner.

TREAT, C.J. . . . If the plaintiff was the owner of the trees, there can be no doubt of his right to maintain replevin for the boards. The property in the trees was not changed by manufacturing them into lumber. The title still continued in the former owner. The property was still capable of being identified. The owner of property, wrongfully taken, may pursue it, so long as it can be identified. Whatever alteration in form it may assume, the owner may reclaim it, in its new shape, if he can establish the identity of the original materials; as where cloth is made into a garment, trees into rails or boards, or iron into bars. The wrongful taker cannot by any act of his own acquire title against the owner, unless he destroys the identity of the thing, or annexes it to, and makes it a part of, some other thing, which is the principal; as the conversion of grain into malt, coin into a cup, or timber into a house. 2 Blackstone's Comm. 404;



2 Kent's Comm. 363; *Snyder v. Vaux*, 2 Rawle, 423; *Betts v. Lee*, 5 Johnson, 348; *Brown v. Sax*, 7 Cowen, 95.

NOTE. — In *Betts v. Lee*, 5 Johns. (N.Y.) 348, the court approved the doctrine that “whatever alteration of form any property has undergone, the owner may seize it, in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber.”

In *Burris v. Johnson*, 1 J. J. Marsh. (Ky.) 196, the court said: “If A enter on the land of B and cut down his timber, without his consent, and construct out of it the frame of a flat-bottomed boat, is B liable to an action of trespass for taking and converting the timber thus constructed?

“This question must be decided in the negative.

“The transformation of the timber into a new shape does not change the specific character or qualities of the native material. It is still wood, exclusively wood, and the same wood which was attached to the freehold in the form of growing trees. And while the original distinctive qualities can be identified, no expenditure of skill or labor, or money, in the alteration of the form of the timber, by a trespasser, can divest the owner of the trees of his right to the wood, into whatever shape, or for whatever purpose it may have been changed, without accession of other materials, or of value beyond what accrued in this case.”

### WETHERBEE v. GREEN.

22 Mich. 311. 1871.

#### ERROR to Bay Circuit.

This was an action of replevin, brought by George Green, Charles H. Camp and George Brooks, in the Circuit Court for the County of Bay, against George Wetherbee, for one hundred and fifty-eight thousand black ash barrel hoops, alleged to be of the value of eight hundred dollars. The hoops were cut upon a tract of land which Green, one of the plaintiffs, and one Thomas Sumner had owned as tenants in common. Green, by parol, had authorized Sumner to sell timber from off the land. Afterwards, Sumner being indebted to Camp and Brooks, the other plaintiffs, conveyed to them, by warranty deed, his undivided half of the land, they agreeing orally to reconvey upon payment. Sumner after his conveyance to Camp and Brooks, sold a quantity of timber growing upon the land to Wetherbee, who cut and manufactured the same into hoops, — for the possession of which this action is brought.

On the trial, the Circuit Judge excluded the testimony offered by

the defendant, to show the character of the transaction between Sumner and Camp and Brooks, and the license derived from Sumner to cut the timber; and under the charge of the court the jury found for plaintiffs. The judgment entered upon the verdict comes into this court by writ of error.

COOLEY, J. The defendants in error replevied of Wetherbee a quantity of hoops, which he had made from timber cut upon their land. Wetherbee defended the replevin suit on two grounds. *First*, he claimed to have cut the timber under a license from one Sumner, who was formerly tenant in common of the land with Green, and had been authorized by Green to give such license. Before the license was given, however, Sumner had sold his interest in the land to Camp and Brooks, the co-plaintiffs with Green, and had conveyed the same by warranty deed; but Wetherbee claimed and offered to show by parol evidence, that the sole purpose of this conveyance was to secure a pre-existing debt from Sumner to Camp and Brooks and that consequently it amounted to a mortgage only, leaving in Sumner, under our statute, the usual right of a mortgagor to occupy and control the land until foreclosure. He also claimed that the authority given by Green to Sumner had never been revoked, and that consequently the license given would be good against Green, and constitute an effectual bar to the suit in replevin, which must fail if any one of the plaintiffs was precluded from maintaining it.

But if the court should be against him on this branch of the case, Wetherbee claimed further that replevin could not be maintained for the hoops, because he had cut the timber in good faith, relying upon a permission which he supposed proceeded from the parties having lawful right to give it, and had, by the expenditure of his labor and money, converted the trees into chattels immensely more valuable than they were as they stood in the forest, and thereby he had made such chattels his own. And he offered to show that the standing timber was worth twenty-five dollars only, while the hoops replevied were shown by the evidence to be worth near seven hundred dollars; also, that at the time of obtaining the license from Sumner he had no knowledge of the sale of Sumner's interest, but, on the other hand, had obtained an abstract of the title to the premises from a firm of land agents at the county seat, who kept an abstract book of titles to land in that county, which abstract showed the title to be in Green and Sumner, and that he then purchased the timber, relying upon the abstract, and upon Sumner's statement that he was authorized by Green to make the sale. The evidence offered to establish these facts was rejected by the court, and the plaintiffs obtained judgment.

The principal question which, from this statement, appears to be presented by the record, may be stated thus: Has a party who has

taken the property of another in good faith, and in reliance upon a supposed right, without intention to commit wrong, and by the expenditure of his money or labor, worked upon it so great a transformation as that which this timber underwent in being transformed from standing trees into hoops, acquired such a property therein that it cannot be followed into his hands and reclaimed by the owner of the trees in its improved condition?

The objections to allowing the owner of the trees to reclaim the property under such circumstances are, that it visits the involuntary wrong-doer too severely for his unintentional trespass, and at the same time compensates the owner beyond all reason for the injury he has sustained. In the redress of private injuries the law aims not so much to punish the wrong-doer as to compensate the sufferer for his injuries; and the cases in which it goes farther and inflicts punitive or vindictive penalties are those in which the wrong-doer has committed the wrong recklessly, willfully, or maliciously, and under circumstances presenting elements of aggravation. Where vicious motive or reckless disregard of right are not involved, to inflict upon a person who has taken the property of another, a penalty equal to twenty or thirty times its value, and to compensate the owner in a proportion equally enormous, is so opposed to all legal idea of justice and right and to the rules which regulate the recovery of damages generally, that if permitted by the law at all, it must stand out as an anomaly and must rest upon peculiar reasons.

As a general rule, one whose property has been appropriated by another without authority has a right to follow it and recover the possession from any one who may have received it; and if, in the meantime, it has been increased in value by the addition of labor or money, the owner may, nevertheless, reclaim it, provided there has been no destruction of substantial identity. So far the authorities are agreed. A man cannot generally be deprived of his property except by his own voluntary act or by operation of law; and if unauthorized parties have bestowed expense or labor upon it, that fact cannot constitute a bar to his reclaiming it, so long as identification is not impracticable. But there must, nevertheless, in reason be some limit to the right to follow and reclaim materials which have undergone a process of manufacture. Mr. Justice Blackstone lays down the rule very broadly, that if a thing is changed into a different species, as by making wine out of another's grapes, oil from his olives, or bread from his wheat, the product belongs to the new operator, who is only to make satisfaction to the former proprietor for the materials converted. 2 Bl. Com. 404. We do not understand this to be disputed as a general proposition, though there are some authorities which hold that, in the case of a willful appropriation, no extent of conversion can give to the willful trespasser a title to the property so long as the original materials can be traced in the

improved article. The distinction thus made between the case of an appropriation in good faith and one based on intentional wrong, appears to have come from the civil law, which would not suffer a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and given them a form which precluded their being restored to their original condition. 2 Kent, 363. While many cases have followed the rule as broadly stated by Blackstone, others have adopted the severe rule of the civil law where the conversion was in willful disregard of right. The New York cases of *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; and *Chandler v. Edson*, 9 Johns. 362, were all cases where the willful trespasser was held to have acquired no property by a very radical conversion, and in *Silisbury v. McCoon*, 3 N.Y. 378, 385, the whole subject is very fully examined, and RUGGLES, J., in delivering the opinion of the court, says that the common law and the civil law agree "that if the chattel wrongfully taken come into the hands of an *innocent holder* who, believing himself to be the owner, converts the chattel into a thing of different species, so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind, the change in the species of the chattel is not an intentional wrong to the original owner. It is, therefore, regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace the identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place"; and further on he says of the civil law, with which the common law is supposed by him to harmonize: "The acknowledged principle of the civil law is that a willful wrong-doer acquires no property in the goods of another either by the wrongful taking, or by any change wrought in them by his labor or skill, however great that change may be. The new product in its improved state belongs to the owner of the original materials, provided it be proved to be made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a willful violator of his right of property." In further illustration of the same views we refer to *Hyde v. Cookson*, 21 Barb. 104; *Martin v. Porter*, 5 M. & W. 351; *Wild v. Holt*, 9 M. & W. 672; *Baker v. Wheeler*, 8 Wend. 508; *Snyder v. Vaux*, 2 Rawle, 427; *Riddle v. Driver*, 12 Ala. 590.

It does not become necessary for us to consider whether the case of *Silisbury v. McCoon*, 3 N.Y. 378, which overruled the prior de-

cisions of the Supreme Court (reported in 4 Denio, 425, and 6 Hill, 332), has not recognized a right in the owner of the original materials to follow them under circumstances when it would not be permitted by the rule as recognized by the authorities generally. That was the case where a willful trespasser had converted corn into whisky, and the owner of the corn was held entitled to the manufactured article. The rule as given by Blackstone would confine the owner, in such case, to his remedy to recover damages for the original taking. But we are not called upon in this case to express any opinion regarding the rule applicable in the case of a willful trespasser, since the authorities agree in holding, that when the wrong had been involuntary, the owner of the original materials is precluded, by the civil law and common law alike, from following and reclaiming the property after it has undergone a transformation which converts it into an article substantially different.

The cases of confusion of goods are closely analogous. It has always been held that he who, without fraud, intentional wrong, or reckless disregard of the rights of others, mingled his goods with those of another person, in such manner that they could not be distinguished, should, nevertheless, be protected in his ownership so far as the circumstances would permit. The question of motive here becomes of the highest importance; for, as Chancellor Kent says, if the commingling of property "was willfully made without mutual consent, . . . the common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. Popham's Rep. 38, pl. 2. If A will willfully intermix his corn or hay with that of B, or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A from what belonged to B, the whole belongs to B. Popham's Rep. *ub. supra*; *Warde v. Ayre*, 2 Bulst. 323," 2 Kent, 364-5; and see 2 Bl. Com. 404; *Hart v. Ten Eyck*, 2 Johns. Ch. 62; *Gordon v. Jenney*, 16 Mass. 465; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N.H. 561; *Roth v. Wells*, 29 N.Y. 486; *Willard v. Rice*, 11 Met. 493; *Jenkins v. Steanka*, 19 Wis. 128; *Hesseltine v. Stockwell*, 30 Me. 237. But this rule only applies to wrongful or fraudulent intermixtures. There may be an intentional intermingling and yet no wrong intended; as where a man mixes two parcels together, supposing both to be his own; or, that he was about to mingle his with his neighbor's, by agreement, and mistakes the parcel. In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust that he should lose his own or be obliged to take and pay for his neighbor's, as he would have been under the civil law. MORTON, J., in *Ryder v. Hathaway*, 21 Pick. 305. In many cases there will be difficulty in determining precisely how he can be protected with due regard to the rights of the other party; but it is clear that the law will not forfeit his property in consequence of the

accident or inadvertence, unless a just measure of redress to the other party renders it inevitable. Story on Bailm., § 40; Sedg. on Dams., 483.

The important question on this branch of the case appears to us to be, whether standing trees, when cut and manufactured into hoops, are to be regarded as so far changed in character that their identity can be said to be destroyed within the meaning of the authorities. And as we enter upon a discussion of this question, it is evident at once, that it is difficult, if not impossible, to discover any invariable and satisfactory test which can be applied to all the cases which arise in such infinite variety. "If grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held in the old English law that the property is so altered as to change the title. Bro., tit. Property, pl. 23"; 2 Kent, 363. But cloth made into garments, leather into shoes, trees hewn or sawed into timber, and iron made into bars, it is said may be reclaimed by the owner in their new and original shape. Sedg. on Dams., 484; *Snyder v. Vaux*, 2 Rawle, 427; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Brown v. Sax*, 7 Cow. 95; *Silisbury v. McCoon*, 4 Denio, 333, *per* BRONSON, J.; *Ibid.*, 6 Hill, 426, *per* NELSON, Ch. J.; *Ibid.*, 3 N.Y. 386, *per* RUGGLES, J. Some of the cases place the right of the former owner to take the thing in its altered condition upon the question whether its identity could be made out by the senses. Year Book 5, H. 7, fo. 15, pl. 6; 4 Denio, 335, note. But this is obviously a very unsatisfactory test, and in many cases would wholly defeat the purpose which the law has in view in recognizing a change of title in any of these cases. That purpose is not to establish any arbitrary distinctions, based upon mere physical reasons, but to adjust the redress afforded to the one party and the penalty inflicted upon the other, as near as circumstances will permit, to the rules of substantial justice.

It may often happen that no difficulty will be experienced in determining the identity of a piece of timber which has been taken and built into a house; but no one disputes that the right of the original owner is gone in such a case. A particular piece of wood might perhaps be traced without trouble into a church organ, or other equally valuable article; but no one would defend a rule of law which, because the identity could be determined by the senses, would permit the owner of the wood to appropriate a musical instrument, a hundred or a thousand times the value of his original materials, when the party who, under like circumstances, has doubled the value of another man's corn by converting it into malt, is permitted to retain it, and held liable for the original value only. Such distinctions in the law would be without reason, and could not be tolerated. When the right to the improved article is the point in issue, the question, how much the property or labor of each has con-

tributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it, — not because the timber cannot be identified, but because in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. The labor, in the case of the musical instrument, is just as much the principal thing as the house is in the other case instanced; the timber appropriated is in each case comparatively unimportant.

No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value. There may be complete changes with so little improvement in value, that there could be no hardship in giving the owner of the original materials the improved article; but in the present case, where the defendant's labor — if he shall succeed in sustaining his offer of testimony — will appear to have given the timber in its present condition nearly all its value, all the grounds of equity exist which influence the courts in recognizing a change of title under any circumstances.

We are of opinion that the court erred in rejecting the testimony offered. The defendant, we think, had a right to show that he had manufactured the hoops in good faith, and in the belief that he had the proper authority to do so; and if he should succeed in making that showing, he was entitled to have the jury instructed that the title to the timber was changed by a substantial change of identity, and that the remedy of the plaintiff was an action to recover damages for the unintentional trespass.

NOTE. — In *Eaton v. Langley*, 65 Ark. 448, the court said (p. 457): "The value of the cross-ties in controversy was twelve and a half cents a tie. The value of each in the tree was two cents. . . . The difference . . . is not so great as to make the value of the latter, as compared with that of the former, insignificant, and to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice at the first blush."

In *Lewis v. Courtright*, 77 Iowa, 190, the defendant, acting in

good faith, cut plaintiff's grass, and made it into hay. The plaintiff failed in an action to recover the hay. "The value of the grass before it was cut was small; some of the evidence tending to show that it was but eight to ten cents an acre. Each acre yielded from a ton and a half of hay, which was worth in stack from two to three dollars per ton."

In *Lampton's Ex'rs v. Preston's Ex'rs*, 1 J. J. Marsh. (Ky.) 454, the court held that if A, acting in good faith, burnt brick out of B's clay, the bricks belonged to B. "It is not the excess of the artificial over the natural value, but the degree of such excess, that is the controlling principle in such cases. . . . It is not disputed that, if A make cloth out of the wool of B, or a table or a boat entirely out of the timber of B, though the value of the new species exceeds that of the material more than twofold, the owner of the material is entitled to the species." See, *accord*, *Baker v. Meisch*, 29 Neb. 227.

In *Strubbee v. Cincinnati Railway*, 78 Ky. 481, the court held that A could recover certain railroad ties from C. The ties were made by B from timber standing on A's land, and purchased, in good faith, by C from B. The timber was worth in the tree from five to fifteen cents per stick, and, when converted into cross-ties, each tie was worth 34½ cents.

In *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332, Judge COOLEY said that an increase of value from \$1.00 a cord to \$2.87½ per cord was not sufficient to change the property, in favor of a person who had in good faith increased the value of the wood.

In *Louis Werner Slave Company v. Pickering*, 55 Texas Civ. App. 632, standing timber worth \$339 had been converted into staves worth \$1080. This was held sufficient to change the ownership, in favor of a person acting in good faith.

In deliberating as to the soundness of the doctrine of *Wetherbee v. Green*, the student should also deliberate as to the soundness of the doctrine that if B, acting in good faith, but without the authority of A, adds value to A's chattel, and A repossesses himself of the improved chattel, B has no cause of action against A for the value of the improvement. See *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332; *Gates v. Rifle Boom Company*, 70 Mich. 309; *Strubbee v. Cincinnati Railway*, 78 Ky. 481, 488.

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### SILSBURY v. McCOON.

3 N.Y. 379. 1850.

THIS was an action of trover for a quantity of whisky. On the first trial before WILLARD, circuit judge, at the Montgomery circuit, in May, 1843, the plaintiffs were nonsuited. The supreme court on bill



of exceptions set aside the nonsuit, and ordered a new trial. (See 6 Hill, 425.) The case was again tried in November, 1844, before the same judge. On that trial it was proved, that one Hackney, a deputy of the sheriff of Montgomery County, on the 22d of March, 1842, by virtue of a *fi. fa.* issued on a judgment in the supreme court in favor of McCoon and Sherman, the defendants, against Uriah Wood, sold the whisky in question, being about twelve hundred gallons, having made a previous levy thereon; and that upon the sale the defendants became the purchasers, and afterwards converted it to their own use. The whisky was levied on and sold at the distillery of the plaintiffs, who forbade the sale.

The plaintiffs having rested, the defendants offered to prove, in their defence, that the whisky was manufactured from corn belonging to Wood, the defendant in the execution; that the plaintiffs had taken the corn and manufactured it into whisky without any authority from Wood, and knowing at the time they took the corn that it belonged to him. The plaintiffs' counsel objected to this evidence, insisting that Wood's title to the corn was extinguished by its conversion into whisky. The circuit judge sustained the objection and refused to receive the evidence. The defendants' counsel excepted. The plaintiffs had a verdict for the value of the whisky, which the supreme court refused to set aside. (See 4 Denio, 332.) After judgment the defendants brought error to this court, where the cause was first argued by Mr. Hill, for the plaintiffs in error, and Mr. Reynolds, for the defendants in error, in September, 1848. The judges being divided in opinion, a re-argument was ordered, which came on in January last.

RUGGLES, J. It is an elementary principle in the law of all civilized communities, that no man can be deprived of his property, except by his own voluntary act, or by operation of law. The thief who steals a chattel, or the trespasser who takes it by force, acquires no title by such wrongful taking. The subsequent possession by the thief or the trespasser is a continuing trespass; and if during its continuance, the wrongdoer enhances the value of the chattel by labor and skill bestowed upon it, as by sawing logs into boards, splitting timber into rails, making leather into shoes, or iron into bars, or into a tool, the manufactured article still belongs to the owner of the original material, and he may retake it or recover its improved value in an action for damages. And if the wrongdoer sell the chattel to an honest purchaser having no notice of the fraud by which it was acquired, the purchaser obtains no title from the trespasser, because the trespasser had none to give. The owner of the original material may still retake it in its improved state, or he may recover its improved value. The right to the improved value in damages is a consequence of the continued ownership. It would be absurd to say that the original owner may retake the thing by an action

of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages. Thus far, it is conceded that the common law agrees with the civil.

They agree in another respect, to wit, that if the chattel wrongfully taken, afterwards come into the hands of an innocent holder who believing himself to be the owner, converts the chattel into a thing of different species so that its identity is destroyed, the original owner cannot reclaim it. Such a change is said to be wrought when wheat is made into bread, olives into oil, or grapes into wine. In a case of this kind the change in the species of the chattel is not an intentional wrong to the original owner. It is therefore regarded as a destruction or consumption of the original materials, and the true owner is not permitted to trace their identity into the manufactured article, for the purpose of appropriating to his own use the labor and skill of the innocent occupant who wrought the change; but he is put to his action for damages as for a thing consumed, and may recover its value as it was when the conversion or consumption took place.

There is great confusion in the books upon the question what constitutes change of identity. In one case (5 Hen. 7, fol. 15), it is said that the owner may reclaim the goods so long as they may be known, or in other words, ascertained by inspection. But this in many cases is by no means the best evidence of identity; and the examples put by way of illustration serve rather to disprove than to establish the rule. The court say that if grain be made into malt, it cannot be reclaimed by the owner because it cannot be known. But if cloth be made into a coat, a tree into squared timber, or iron into a tool, it may. Now as to the cases of the coat and the timber, they may or may not be capable of identification by the senses merely, and the rule is entirely uncertain in its application; and as to the iron tool, it certainly can not be identified as made of the original material, without other evidence. This illustration, therefore, contradicts the rule. In another case (Moore's Rep. 20), trees were made into timber and it was adjudged that the owner of the trees might reclaim the timber, "because the greater part of the substance remained." But if this were the true criterion it would embrace the cases of wheat made into bread, milk into cheese, grain into malt, and others which are put in the books as examples of a change of identity. Other writers say that when the thing is so changed that it can not be reduced from its new form to its former state, its identity is gone. But this would include many cases in which it has been said by the courts that the identity is not gone; as the case of leather made into a garment, logs into timber or boards, cloth into a coat, etc. There is therefore no definite settled rule on this question; and although the want of such a rule may create embarrassment in a case in which

the owner seeks to reclaim his property from the hands of an honest possessor, it presents no difficulty where he seeks to obtain it from the wrongdoer, provided the common law agrees with the civil in the principle applicable to such a case.

The acknowledged principle of the civil law is that a wilful wrongdoer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great that change may be. The new product, in its improved state, belongs to the owner of the original materials, provided it be proved to have been made from them; the trespasser loses his labor, and that change which is regarded as a destruction of the goods, or an alteration of their identity in favor of an honest possessor, is not so regarded as between the original owner and a wilful violator of his right of property.

These principles are to be found in the Digest of Justinian (lib. 10, tit. 4, leg. 12, § 3). "If any one shall make wine with my grapes, oil with my olives, or garments with my wool, knowing they are not his own, he shall be compelled by action to produce the said wine, oil or garments." So in Vinnius' Institutes, tit. 1, pl. 25. "He who knows the material is another's ought to be considered in the same light as if he had made the species in the name of the owner, to whom also he is to be understood to have given his labor."

The same principle is stated by Puffendorf in his Law of Nature and of Nations (b. 4, ch. 7, § 10) and in Wood's Institutes of the Civil Law, p. 92, which are cited at large in the opinion of JEWETT, J., delivered in this case in the supreme court (4 Denio, 338) and which it is unnecessary here to repeat. In Brown's Civil and Admiralty Law, p. 240, the writer states the civil law to be that the original owner of anything improved by the act of another, retained his ownership in the thing so improved, unless it was changed into a different species; as if his grapes were made into wine, the wine belonged to the maker, who was only obliged to pay the owner for the value of his grapes. The species, however, must be incapable of being restored to its ancient form; and the materials must have been taken in ignorance of their being the property of another.

*2 Court* But it was thought in the court below that this doctrine had never been adopted into the common law, either in England or here; and the distinction between a wilful and an involuntary wrongdoer herein before mentioned, was rejected not only on that ground but also because the rule was supposed to be too harsh and rigorous against the wrongdoer.

It is true that no case has been found in the English books in which that distinction has been expressly recognized; but it is equally true that in no case until the present has it been repudiated or denied. The common law on this subject was evidently borrowed from the Roman at an early day; and at a period when the common law fur-

nished no rule whatever in a case of this kind. Bracton, in his treatise compiled in the reign of Henry III, adopted a portion of Justinian's Institutes on this subject without noticing the distinction; and Blackstone, in his Commentaries, vol. 2, p. 404, in stating what the Roman law was, follows Bracton; but neither of these writers intimate that on the point in question there is any difference between the civil and the common law. The authorities referred to by Blackstone in support of his text are three only. The first in Brooke's Abridgment, tit. Property, 23, is the case from the Year Book, 5 H. 7, fol. 15 (translated in a note to 4 Denio, 335), in which the owner of leather brought trespass for taking slippers and boots, and the defendant pleaded that he was the owner of the leather and bailed it to J. S. who gave it to the plaintiff, who manufactured it into slippers and boots, and the defendant took them as he lawfully might. The plea was held good and the title of the owner of the leather unchanged. The second reference is to a case in Sir Francis Moore's reports, p. 20, in which the action was trespass for taking timber, and the defendant justified on the ground that A entered on his land and cut down trees and made timber thereof, and carried it to the place where the trespass was alleged to have been committed, and afterwards gave it to the plaintiff, and that the defendant therefore took the timber as he lawfully might. In these cases the chattels had passed from the hands of the original trespasser into the hands of a third person; in both it was held that the title of the original owner was unchanged; and that he had a right to the property in its improved state against the third person in possession. They are in conformity with the rule of the civil law; and certainly fail to prove any difference between the civil and the common law on the point in question. The third case cited is from Popham's reports, p. 38, and was a case of confusion of goods. The plaintiff voluntarily mixed his own hay with the hay of the defendant, who carried the whole away, for which he was sued in trespass; and it was adjudged that the whole should go to the defendant; and Blackstone refers to this case in support of his text, that "our law to guard against fraud gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent." The civil law in such a case would have required him who retained the whole of the mingled goods to account to the other for his share (Just. Inst. lib. 2, tit. 1, § 28), and the common law in this particular appears to be more rigorous than the civil; and there is no good reason why it should be less so in a case like that now in hand, where the necessity of guarding against fraud is even greater than in the case of a mingling of goods, because the cases are likely to be of more frequent occurrence. Even this liability to account to him whose conduct is fraudulent, seems by the civil law to be limited to cases in which the goods are of

*Distinction*

such a nature that they may be divided into shares or portions, according to the original right of the parties; for by that law if A. obtain by fraud the parchment of B. and write upon it a poem, or wrongfully take his tablet and paint thereon a picture, B. is entitled to the written parchment and to the painted tablet, without accounting for the value of the writing or of the picture. Just. Inst. lib. 2, tit. 1, §§ 23, 24. Neither Bracton nor Blackstone have pointed out any difference except in the case of confusion of goods between the common law and the Roman, from which on this subject our law has mainly derived its principles.

So long as property wrongfully taken retains its original form and substance, or may be reduced to its original materials, it belongs, according to the admitted principles of the common law, to the original owner, without reference to the degree of improvement, or the additional value given to it by the labor of the wrongdoer. Nay more, this rule holds good against an innocent purchaser from the wrongdoer, although its value be increased an hundred fold by the labor of the purchaser. This is a necessary consequence of the continuance of the original ownership.

There is no satisfactory reason why the wrongful conversion of the original materials into an article of a different name or a different species should work a transfer of the title from the true owner to the trespasser, provided the real identity of the thing can be traced by evidence. The difficulty of proving the identity is not a good reason. It relates merely to the convenience of the remedy, and not at all to the right. There is no more difficulty or uncertainty in proving that the whisky in question was made of Wood's corn, than there would have been in proving that the plaintiff had made a cup of his gold, or a tool of his iron; and yet in those instances, according to the English cases, the proof would have been unobjectionable. In all cases where the new product can not be identified by mere inspection, the original material must be traced by the testimony of witnesses from hand to hand through the process of transformation.

Again. The court below seem to have rejected the rule of the civil law applicable to this case, and to have adopted a principle not heretofore known to the common law; and for the reason that the rule of the civil law was too rigorous upon the wrongdoer, in depriving him of the benefit of his labor bestowed upon the goods wrongfully taken. But we think the civil law in this respect is in conformity not only with plain principles of morality, but supported by cogent reasons of public policy; while the rule adopted by the court below leads to the absurdity of treating the wilful trespasser with greater kindness and mercy than it shows to the innocent possessor of another man's goods. A single example may suffice to prove this to be so. A trespasser takes a quantity of iron ore belonging to another and converts it into iron, thus changing the species and identity of the

article: the owner of the ore may recover its value, in trover or trespass; but not the value of the iron, because under the rule of the court below it would be unjust and rigorous to deprive the trespasser of the value of his labor in the transmutation. But if the same trespasser steals the iron and sells it to an innocent purchaser, who works it into cutlery, the owner of the iron may recover of the purchaser the value of the cutlery, because by this process the original material is not destroyed, but remains, and may be reduced to its former state; and according to the rule adopted by the court below as to the change of identity the original ownership remains. Thus the innocent purchaser is deprived of the value of his labor, while the guilty trespasser is not.

The rule adopted by the court below seems, therefore, to be objectionable, because it operates unequally and unjustly. It not only divests the true owner of his title, without his consent; but it obliterates the distinction maintained by the civil law, and as we think by the common law, between the guilty and the innocent; and abolishes a salutary check against violence and fraud upon the rights of property.

We think, moreover, that the law on this subject has been settled by judicial decisions in this country. In *Betts v. Lee*, 5 John. 349, it was decided that as against a trespasser the original owner of the property may seize it in its new shape, whatever alteration of form it may have undergone, if he can prove the identity of the original materials. That was a case in which the defendant had cut down the plaintiff's trees, and made them into shingles. The property could neither be identified by inspection, nor restored to its original form; but the plaintiff recovered the value of the shingles. So in *Curtis v. Groat*, 6 John. 169, a trespasser cut wood on another's land and converted it into charcoal. It was held that the charcoal still belonged to the owner of the wood. Here was a change of the wood into an article of different kind and species. No part of the substance of the wood remained in its original state; its identity could not be ascertained by the senses, nor could it be restored to what it originally was. That case distinctly recognizes the principle that a wilful trespasser can not acquire a title to property merely by changing it from one species to another. And the late Chancellor Kent, in his Commentaries (vol. 2, p. 363), declares that the English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser; and that it was settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, if he could prove the identity of the original materials.

The same rule has been adopted in Pennsylvania. *Snyder v. Vaux*, 2 Rawle, 427. And in Maine and Massachusetts it has been

applied to a wilful intermixture of goods. *Ryder v. Hathaway*, 21 Pick. 304, 305; *Wingate v. Smith*, 7 Shep. 287; *Willard v. Rice*, 11 Metc. 493.

We are therefore of opinion that if the plaintiffs below in converting the corn into whisky knew that it belonged to Wood, and that they were thus using it in violation of his right, they acquired no title to the manufactured article, which although changed from the original material into another of different nature, yet being the actual product of the corn, still belonged to Wood. The evidence offered by the defendants and rejected by the circuit judge ought to have been admitted.

The right of Wood's creditors to seize the whisky by their execution is a necessary consequence of Wood's ownership. Their right is paramount to his, and of course to his election to sue in trover or trespass for the corn.

The judgment of the supreme court should be reversed and a new trial ordered.

GARDINER, JEWETT, HURLBUT and PRATT, Js., concurred.

BRONSON, Ch. J. Two very able arguments here, against the opinion which I delivered when the case was before the supreme court (4 Denio, 332), have only served to confirm me in the conclusion at which I then arrived. I shall add but little now to what I said on the former occasion.

The owner may, as a general rule, follow and retake the property of which he has been wrongfully deprived so long as the same thing remains, though it may have been changed in form and value by the labor and skill of the wrongdoer. But when, as in this case, the identity of the thing has been destroyed by a chemical process, so that the senses can no longer take cognizance of it — when it has not only changed its form and appearance, but has so combined with other elements that it has ceased to be the same thing, and become something else, the owner can, I think, follow it no longer: his remedy is an action for damages. Such I take to be the rule of the common law; and that is our law.

The rule for which the defendants contend, that in the case of a wilful trespass the owner may follow and retake his property after it has been changed into a thing of a different species — that he may trace corn into whisky, and take the new product — is open to several objections. First: it would be nearly or quite impossible to administer such a rule in trials by jury. Second: the rule would often work injustice, by going beyond the proper measure of either redress or punishment; while an action for damages would render exact justice to both parties. It is very true that a wilful trespasser should be punished; but that proves nothing. All agree that he should be made to suffer; but the mode and measure of punishment are questions

which still remain. If one has knowingly taken six pence worth of his neighbor's goods as a trespasser, he should neither be imprisoned for life, nor should he forfeit a thousand dollars. We should not lose sight of the fact, that the rule now to be established is one for future as well as present use; and it may work much greater injustice in other cases than it can in this. Third: there is no authority at the common law for following and retaking the new product in a case like this. I make the remark with the more confidence, because the very diligent counsel for the defendants, after having had several years, pending this controversy, for research, has only been able to produce some *dicta* of a single jurist, without so much as one common-law adjudication in support of the rule for which he contends. He is driven to the civil law; and then the argument is, that because we, in common with the civilians, allow the owner to retake his property in certain cases, we must be deemed to have adopted the rule of the civil law on this subject in its whole extent. But that is a *non sequitur*. It often happens that our laws and those of the Romans — and, indeed, of all civilized nations — are found to agree in some particulars, while they are widely different in others; and this is true of laws relating to a single subject. There is no force, therefore, in the argument, that because our law touching this matter is to some extent like the civil law, it may be presumed that the two systems are alike in every particular. And clearly, the burden of showing that the Roman law is our law, lies on those who affirm that fact. There is not only the absence of any common-law adjudication in favor of the rule for which the defendants contend, but in one of the earliest cases on the subject to be found in our books (Year Book, 5 H. 7, fol. 15; 4 Denio, 335, note), the court plainly recognized the distinction which has been mentioned, and admitted that the owner could not retake the property after its identity had been destroyed and "grain taken and malt made of it" was given as an example.

There are many cases where the title to a personal chattel may be turned into a mere right of action, without the consent of the owner, although the thing was taken by a wilful trespasser, or even by a thief. If a man steal a piece of timber, and place it as a beam or rafter in his house; or a nail, and drive it into his ship; or paint, and put it upon his carriage, the owner can not retake his goods, but is put to his action for damages; and this is so in the civil as well as at the common law. If a thief take water from another's cistern, and use it in making beer; or salt, and use it in pickling pork; or fuel, and use it in smoking hams, I suppose no one will say, that the owner of the water, the salt or the fuel may seize the beer, the pork or the hams. And there is no better reason for giving him the new product, where sand is made into glass, malt into beer, coal into gas, or grain into whisky. In the case now before us, the civilians would not go so far as to say, that the owner of the grain might take the swine which



were fattened on the refuse of the grain after it had gone through the process of distillation. And yet that would hardly be more unjust or absurd than it would be to give him the whisky. There must be a limit somewhere; and I know of none which is more safe, practical and just than that which allows the owner to follow a chattel until it has either been changed into a different species, or been adjoined to something else, which is the principal thing; and stops there. Thus far our courts have gone, and there they have stopped. We have neither precedent nor reason in favor of taking another step; and I can not take it.

Judge HARRIS agrees with me in the opinion that the judgment of the supreme court is right, and should be affirmed.

TAYLOR, J., did not hear the argument, and gave no opinion.

*Judgment reversed.*

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PULCIFER v. PAGE.

32 Maine, 404. 1851.

TRESPASS for an iron chain, which each of the parties claimed to own.

The evidence tended to show, *that* each of the parties had a chain; — *that* each chain had been broken into several pieces; *that* the plaintiff, without the consent or knowledge of the defendant, carried all the pieces to a blacksmith, and had them made up into two chains; — and *that* the defendant carried away one of them into which some part of his own chain had been incorporated. It was for this chain, that this suit is brought.

The judge instructed the jury that if the plaintiff had only incorporated into this chain some small portion of the defendant's chain without his consent, not exceeding two or three links, it would not thereby become the property of the defendant. To this ruling the defendant excepted.

*Woodman*, for the defendant. The charge of the judge was erroneous in instructing the jury, that the property of the chain depended upon the quantity of the defendant's chain, which the plaintiff had incorporated into the one in dispute. The right of property in the chain as a whole or as to parts of it, depended rather upon the fact that the mixture was made without the defendant's consent or knowledge by the plaintiff, and upon the manner and motive of doing it.

HOWARD, J. This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession.

This was a rule of the Roman and of the English law, and has been adopted, as it is understood, in the United States, generally. Dig. 6, 1, 61; *Bracton de acq. rerum dom.* B. 2, c. 2, § 3, 4; Molloy, B. 2, c. 1, § 7; Pothier, *Traité du droit de propriété*, L. 1, c. 2, art. 3, Nos. 169-180; 2 Black. Com. 404; 1 Bro. Civil Law, 241; *Glover v. Austin*, 6 Pick. 209; *Sumner v. Hamlet*, 12 Pick. 76; *Merritt v. Johnson*, 7 Johns, 473; 2 Kent's Com. 361.

The distinctions and qualifications, that may be appropriate and necessary in the application of this doctrine to a variety of cases that may arise, do not require consideration in determining this case. The first instruction stated was favorable to the defendant, and forms no ground of exceptions for him; and the plaintiff does not complain of it. The second instruction, that "if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incorporation of such small portion become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

*Exceptions overruled, judgment on the verdict.*

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### RICKETTS v. DORREL.

55 Ind. 470. 1876.

REPLEVIN. The plaintiff claimed that the defendant had taken certain rails and staves of wood belonging to him. The defendant had used them to build a fence.

BIDDLE, J. The special findings in this case plainly show that the rails and stakes replevied, at the time the suit was commenced, and when they were taken by virtue of the writ, constituted a part of a standing fence, and were, therefore, a part of the realty. We are of the opinion that they were not "personal goods," in the true meaning of the statute authorizing replevin (2 R. S. 1876, p. 628, sec. 71), and, therefore, not subject to be replevied, even admitting that they were wrongfully taken and wrongfully detained, and wrongfully put in the fence, by the appellant. If a person wrongfully took and detained shingles, and nailed them upon his roof, or wrongfully took and detained brick, and laid them in a wall, it would be a mischievous and unsafe rule to allow the owner to replevy them, even though his rights were greatly outraged. There are other remedies to redress a wrong of this kind; and in laying down the present rule as law, we deny the party no right, but simply refuse him a remedy by replevin. In the present case, if the appellee has suffered a wrong, we think he has mistaken his remedy to redress it.

## NOTE.

THE questions presented by the cases given above will suggest many questions to the mind of the student which are, however, questions as to the measure of damages, and not questions as to methods by which title to chattels is acquired.

1. B, in good faith, improves A's chattel, and A elects to seek money and not the chattel. By the weight of authority, A recovers only the value of the chattel in its unimproved condition. See *Weymouth v. Chicago Ry. Co.*, 17 Wis. 550.

2. B, in good faith, improves A's chattel, and A replevies. Assume that B is allowed by statute to retain or resume possession of the chattel on giving a bond to produce the chattel or pay its value if judgment is given against him. B gives such bond, and judgment is given against him. Most courts will not give A the full value of the improved chattel, but will give him either the value of the unimproved chattel, or the value of the improved chattel, less a just allowance for the value of B's improvement. See *Eaton v. Langley*, 65 Ark. 448.

3. B, conscious that the chattel belongs to A, improves it. A elects to seek money and not the chattel. It is difficult to see why he should recover more than the value of the chattel in its unimproved condition. See the reasoning in *Single v. Schneider*, 30 Wis. 570, and *Moody v. Whitney*, 38 Me. 174. But there are numerous statements to the contrary. See *Silisbury v. McCoon*, 3 N.Y. 379, 384.

4. B, conscious that the chattel belongs to A, improves it, and A replevies. B gives the bond mentioned in case 2, *supra*. By the weight of authority, A recovers the value of the chattel in its improved condition. See *Heard v. James*, 49 Miss. 236.

5. B, in good faith, improves A's chattel, and assumes to sell it to C, who in good faith assumes to buy it. A may by the weight of authority recover from C only as much as he could have recovered from B. See *Hoyt v. Duluth R.R. Co.*, 103 Minn. 396. See *contra*, *Wing v. Milliken*, 91 Me. 387.

6. B, conscious that the chattel belongs to A, improves it and assumes to sell it to C, who in good faith assumes to buy it. A may by the weight of authority recover from C the value of the article at the time C took possession of it. See *Wooden Ware Co. v. U.S.*, 106 U.S. 432. See *contra*, *Railway Co. v. Hutchins*, 32 Ohio, 571.

## CHAPTER V.

### TORTIOUS CONFESSION.

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#### PICKERING v. MOORE.

67 N.H. 533. 1893.

TROVER, for manure. Facts found by the court. March 31, 1883, the defendant leased his farm for the term of three years to the plaintiff, who covenanted to carry on the place in a "husbandlike manner," and to consume and convert into manure, to be used or left upon the premises, all hay and fodder raised thereon. The plaintiff occupied the farm and performed all his covenants contained in the lease, without any new or further contract, until May 30, 1892. During the last year of his occupancy he fed out upon the farm a large quantity of fodder not produced on the place. He put twenty-five cords of the manure made from this fodder, and manure of the same quality and value made from fodder raised on the place, together, in a heap, where they were so intermixed that they could not be distinguished. The defendant prevented him from taking away the twenty-five cords.

CARPENTER, J. The plaintiff held the farm after the expiration of three years, as tenant from year to year, upon the terms expressed in the lease. *Russell v. Fabyan*, 34 N.H. 218, 223; *Conway v. Starkweather*, 1 Denio, 113. Manure made upon a farm by the consumption of its products in the ordinary course of husbandry is a part of the realty. It cannot be sold or carried away by a tenant without the landlord's consent. *Sawyer v. Twiss*, 26 N.H. 345, 349; *Perry v. Carr*, 44 N.H. 118, 120; *Hill v. De Rochemont*, 48 N.H. 87, 88. The doctrine "was established for the benefit of agriculture. It found its origin in the fact that it is essential to the successful cultivation of a farm that the manure produced from the droppings of cattle and swine fed upon the products of the farm, and composted with earth and vegetable matter taken from the land, should be used to supply the drain made upon the soil in the production of crops, which otherwise would become impoverished and barren; and in the fact that the manure so produced is generally regarded by farmers in this country as a part of the realty, and has been so treated by landlords and tenants from time immemorial." *Haslem v. Lockwood*, 37 Conn. 500, 505.

Whether a tenant, "where there is no positive agreement dispensing with the engagement to cultivate his farm in a husbandlike manner, is bound to spend the hay and other like produce upon it as the means of preserving and continuing its capacity" (*Perry v. Carr and Hill v. De Rochemont, supra*), in other words, whether the express or implied obligation to cultivate the farm in "a husbandlike manner" binds him as matter of law to convert into manure all the fodder grown on the premises, is a different and possibly an open question. *Wing v. Gray*, 36 Vt. 261, 266, 267; *Lewis v. Lyman*, 22 Pick. 437, 444, 445; *Middlebrook v. Corwin*, 15 Wend. 169, and cases cited. *Brown v. Crump*, 1 Marsh. C. P. 567; *Legh v. Hewitt*, 4 East, 154, 159; *Moulton v. Robinson*, 27 N.H. 550, 561; *Cool. Torts*, 334,

a livery stable." *Hill v. De Rochemont*, 48 N.H. 87, 90; *Corey v. Bishop*, 48 N.H. 146, 148. It is immaterial whether the additional stock is kept for hire, or is the tenant's property. *Needham v. Allison*, 24 N.H. 355.

The plaintiff did not lose his property in the manure by intermixing it with the defendant's manure of the same quality and value without his consent. It is not claimed that the plaintiff mixed the manure with any fraudulent or wrongful intent. "The intentional and innocent intermixture of property of substantially the same quality and value does not change the ownership. And no one has a right to take the whole, but in so doing commits a trespass on the other owner. He should notify him to make a division, or take his own proportion at his peril, taking care to leave to the other owner as much as belonged to him." *Ryder v. Hathaway*, 21 Pick. 298, 306; *Gilman v. Hill*, 36 N.H. 311, 323; *Robinson v. Holt*, 39 N.H. 557, 563; *Moore v. Bowman*, 47 N.H. 494, 501, 502; *Cheshire Railroad v. Foster*, 51 N.H. 490, 493. "Even if the commingling were malicious or fraudulent, a rule of law which would take from the wrongdoer the whole, when to restore to the other his proportion would do him full justice, would be a rule not in harmony with the general rules of civil remedy, not only because it would award to one party a redress beyond his loss, but because it would compel the other party to pay not damages, but a penalty." *Cool. Torts*, 53, 54.

Whether the parties were tenants in common of the manure is a question that need not be determined. *Gardner v. Dutch*, 9 Mass.

427, 430, 431; *Ryder v. Hathaway*, 21 Pick. 298, 305; *Chapman v. Shepard*, 39 Conn. 413, 425; *Kimberly v. Patchin*, 19 N.Y. 330, 341. Assuming that they were, the action may be maintained. A tenant in common has the same right to the use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-tenants. Where two have each an equal title to an indivisible chattel, "as of a horse, an ox or a cowe," neither, without actual and exclusive possession of the chattel, can enjoy his moiety. Simultaneous enjoyment by each of his equal right is impossible. Hence, neither can lawfully take it from the possession of the other. The one excluded from possession has no legal remedy except to take it "when he can see his time." Lit., s. 323; *Southworth v. Smith*, 27 Conn. 355, 359.

A tenant in common of personal as well as real property has a right to partition if partition is possible, and if not, to a regulation of its use equivalent to partition or to a sale. Co. Lit. 164 b, 165 a; *Stoughton v. Leigh*, 1 Taunt. 402, 411, 412; *Morrill v. Morrill*, 5 N.H. 134, 135; *Crowell v. Woodbury*, 52 N.H. 613. On partition he is entitled to no particular part of the property, but only to his due proportion in value and quality of the whole. When it consists of chattels differing in quality and value, an appraisal of the value and a consideration of the qualities of the several chattels are essential to an assignment to each of his just share. In this case, as in that of a single indivisible chattel, if the parties cannot agree upon the use, sale, or division, judicial intervention is necessary. Until an adjudication of their rights, neither can assert a title in severalty to any portion of the property. When the common property is divisible by weight, measure, or number into portions identical in quality and value, as corn and various other articles, a different case is presented. There is no question of legal or equitable right. There is and can be no dispute that a court of law or equity can settle. Counting, weighing, and measuring are not judicial, but ministerial functions. Equity could do no more than decree that each might take so many pounds, bushels, or yards, or so many of the articles in number, and enforce its decree by process, in other words, enforce the conceded right. One may in general do without a decree what equity would decree that he might do. Neither law nor equity allows one in the exercise of his own rights to do an unnecessary and avoidable injury to another. One is entitled to the possession of the whole in those cases only where it is necessary to his enjoyment of his moiety. Here it is not necessary. There is no more difficulty in separating one portion from another, than there is in selecting A's marked sheep from B's flock. Either may make the division. The law is not so unreasonable as to compel a resort to the courts in order to obtain a partition which either may make without expense and without danger of injustice to his co-tenant. Except in *Daniels v.*

*Brown*, 34 N.H. 454, it has never been held, so far as observed, that a tenant in common is liable to his co-tenant in any form of proceeding for taking from the latter's possession and consuming or destroying his just proportion only of the common property. The conveyance by a tenant in common of a part of the common land by metes and bounds may effect a partition, and will if it does no injustice to his co-tenants, — if their just share can be assigned to them out of the remaining land. *Holbrook v. Bowman*, 62 N.H. 313, 321. No reason is perceived why a similar doctrine should not be applied in the case of a common tenancy of chattels. If A and B own in common 100 horses, and B sells 10 of them to C, why should A be permitted to take them "when he can see his time," if he has possession of and can have his full share assigned to him from the remaining 90? However that may be, a tenant in common of goods divisible by tale or measure may, without the consent and against the will of his co-tenant, rightfully take and appropriate to his sole use, sell or destroy so much of them as he pleases, not exceeding his share, and by so doing effect *pro tanto* a valid partition. To this extent *Daniels v. Brown*, *supra*, is overruled. *Haley v. Colcord*, 59 N.H. 7, 8; *Gage v. Gage*, 66 N.H. 282, 288; *Seldon v. Hickock*, 2 Cal. 166; *Lobdell v. Stowell*, 51 N.Y. 70, and cases cited; *Stall v. Wilbur*, 77 N.Y. 158, 164; *Cool. Torts*, 455; 6 Am. Law Rev. 455-459, and cases cited. The defendant, by preventing the plaintiff from taking his part of the manure, exercised a dominion over it inconsistent with the plaintiff's rights. *Evans v. Mason*, 64 N.H. 98.

*Judgment for the plaintiff.*

WALLACE, J., did not sit: the others concurred.

NOTE. — In *Ryder v. Hathaway*, 21 Pick. (Mass.) 298, the court said (p. 305): "There may be an intentional intermingling, and yet no wrong intended. . . . In such cases, which may be deemed accidental intermixtures, it would be unreasonable and unjust, that he should lose his own, or be obliged to take his neighbor's. If they were of equal value, as corn, or wood, of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But if they were of unequal value the rule would be more difficult. And if the intermixture was such as to destroy the property, the whole loss should fall on him whose carelessness or folly or misfortune caused the destruction of the whole." See also *Pratt v. Bryant*, 20 Vt. 333, 337.

In *Ayre v. Hixson*, 53 Or. 19, the court said (p. 32): "It is a question of confusion of goods. The remedies of the parties owning portions of the property so commingled depend upon the circumstances of the commingling; namely, whether by consent of the owners, by mistake or accident, or whether it was the result of wilful, careless, or fraudulent conduct. In the first two cases, as between the owners,

neither of them will lose his property, but each will be treated as a tenant in common in proportion to his interest."

There is, it is submitted, no clear authority as to the rule of law where the mixture of units of unequal value was made in good faith. The result of the mixture is a mass not practically severable. This situation is not dissimilar to the situation shown by the facts of *Pulcifer v. Page* in the preceding chapter.

## GREAT SOUTHERN GAS CO. v. LOGAN NATURAL GAS CO.

155 Fed. 114. 1907.

APPEAL from the Circuit Court of the United States for the Southern District of Ohio.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. This case was here upon the questions arising over conflicting leases of the oil and gas rights in the same land. The facts are fully stated in our former opinion. 126 Fed. 623, 61 C. C. A. 359. Shortly after the litigation began defendants struck gas, and they continued to take and market the gas until the well was exhausted. The court below referred the case to a special master for an accounting as to the value of the gas. It appeared that the gas from the well was conducted to a pipe line, together with the gas from some 60 wells owned by the defendant, and that no serious effort was made to measure the contribution of this well to the pipe line. Upon the theory of confusion of goods by a trespasser, the master charged the defendant with the gross receipts for the entire product of its 60 wells aggregating over \$1,000,000. Upon exceptions this report was set aside, and the value of the gas fixed by the Circuit Judge at \$10,000, that being the estimated market value of a gas well of the approximate productiveness of this well in the Sugar Grove field. The plaintiff assigned error to this decree. That the defendant was a trespasser *ab initio* must be now conceded. That it continued to use this gas during the litigation which denied its title, and that it did this taking no care to determine the amount of the gas or its value thus wrongfully taken, must be also conceded. Conceding that it was a good faith claimant and that the litigation was not flimsy, but *bona fide*, it nevertheless remains that it must fully compensate the plaintiff. *Powers v. U.S.*, 119 Fed. 562, 56 C. C. A. 128; *Jegon v. Vivian*, L. R. 6 Ch. App. 742, 761; *Whitney v. Huntington*, 37 Minn. 197, 33 N. W. 561; *Ross v. Scott*, 15 Lea (Tenn.), 479. Having taken no step by which it can account for the property of plaintiff, it must submit to every inconvenience in ascertaining that

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compensation and all reasonable doubts which arise in that accounting. *Wetherbee v. Green*, 22 Mich. 311, 7 Am. Rep. 653. The reasonable market value of a gas well does not, under the peculiar circumstances, compensate plaintiff. That would be to give it only the value of the gas in the ground. That might be adequate but for the fact that plaintiff had its own pipe line, and could therefore market gas from this well with little addition to the cost of conducting its business.

This well is also shown to have been a larger producer than the average well in this field. It also appears that all of the wells contributing to defendants' pipe line did not contribute during the entire life of this well, and, further, that the appellant was obliged to buy gas of appellee to meet its own requirements. In view of all of the facts, we conclude that an aliquot part of the gross product of 60 wells will not be an unjust compensation. *Cooley on Torts*, 53; *Sutherland on Damages*, § 101; *Moore v. Bowmen*, 47 N.H. 494, 500. The gross product was marketed for \$1,003,813. One sixtieth part of this is \$16,730.21. The decree will be therefore modified so as to fix the damages at that sum, with interest from the date of our former decree affirming the decree of the Circuit Court, and costs.

NOTE. — In determining how much of the mass was contributed by the wrongdoer, all difficulties of proof are to be met by him and all reasonable doubts resolved against him. This is so where the wrongdoer acted in good faith, and, *a fortiori*, where he acted in bad faith. See *First National Bank v. Henry*, 159 Ala. 367, 376; *Mugge v. Jackson*, 53 Fla. 323, 326; *Maloney v. King*, 30 Mont. 158, 168; *Lance v. Butler*, 135 N.C. 419.

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### STEPHENSON v. LITTLE.

10 Mich. 433. 1862.

THE plaintiff cut timber from government land, and mixed it with timber of the same character cut from his own land. He did not act in good faith. The defendants, acting for the government, seized the whole mass, and exercised certain acts of dominion over it, and the plaintiff brought trover against them.

MANNING, J. The party guilty of a fraudulent confusion of goods loses all interest therein, on the principle, I take it, that by the admixture he is unable any longer to identify his own, and is therefore remediless, unless on the equitable principle of giving him a part of the common mass equal to what he originally possessed, where the goods are of equal value, and it can be done without injury to the other party, and fraud does not intervene to prevent its application.

Whether correct or not in what I suppose to be the reason of the rule, the rule itself is too clearly established to be called in question. — *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Metc. 493; *Hesseltine v. Stockwell*, 30 Me. 237; *Bryant v. Ware*, 30 Me. 295.

The logs taken from the government land were so mixed with those taken from the plaintiff's own land, that one could not be distinguished from the other; and from the evidence in the case, I think this was done designedly, and with a view of defrauding the Government.

The application to exchange the south fractional half of the north-west quarter of section thirty, for lot three of the same section, after the plaintiff had stripped it of the timber, without disclosing that fact in his petition, and the taking of the timber from lot three before he was notified that the Commissioner of the General Land Office had given his consent to the change, was an attempt to defraud the Government, which it was the duty of the Receiver of the Land Office, on discovering the facts, to prevent, as he did. To my mind, the evidence shows a clear case of fraudulent intermixture, by which the plaintiff has lost all right to the logs taken from his own land and intermixed by him with the far greater number of logs taken from lot three, and other lands belonging to the Government.

I think the judgment should be affirmed, with costs.

CHRISTIANCY, J., concurred in this opinion.

CAMPBELL, J. Where two kinds of articles are so mixed that they form a mass not like either, but differing in value or kind, the party not in fault, because he can not get back either his own property or that which will to all intents and purposes replace it, may, as has been held, retain the whole — although by the civil law there may be some doubt whether he was not obliged to account for the surplus value. But where a mass of articles of a certain kind and value, as grain or the like, is mixed with another mass of the same kind and value, there is neither reason nor justice in holding that any such forfeiture arises. A person is not damnified by mixing his property in a mass from which he can withdraw what will be substantially and to all intents and purposes identical with it. I do not think the decisions, when carefully weighed, maintain any such doctrine as would create a forfeiture in such a case. Where a man can obtain all that he is entitled to in order to put him in full enjoyment of his own, the law will not bestow on him the property of another.

That logs are to be governed by similar rules there can be no reason to doubt. We not only know as a matter of common information, but the evidence before us shows that logs situated as these were had a uniform value per thousand feet, taking them as they ran, and that one parcel was as good as another parcel. There may be differences between select and poor logs, but where it exists there is no great danger of such an intermixture as will prevent a party from

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reclaiming his own or its equivalent. In the case before us the testimony of value shows that no difference existed.

There was no reason therefore why the defendants should have seized more than what belonged to Government, the amount of which they had ascertained. They did not seize the logs for the purpose of selecting that amount. They seized the whole, claiming them as public property, and at once advertised them for sale, thus negating any idea of holding them for the other purpose. Such a seizure amounts to a conversion, and I think they should have been held liable accordingly.

NOTE. — In support of the opinion of MANNING, J., see *Ryder v. Hathaway*, 21 Pick. (Mass.) 298, 305; *Stone v. Marshall Oil Co.*, 208 Pa. 85; *Ward v. Ayre*, Cro. Jac. 366; *Spence v. Union Marine Insurance Co.*, L. R. 3 C. P. 427, 437.

In support of the opinion of CAMPBELL, J., see *Hesseltine v. Stockwell*, 30 Me. 237, 242; *Robinson v. Holt*, 39 N.H. 557, 563; *St. Paul Boom Co. v. Kemp*, 125 Wis. 138; *Lupton v. White*, 15 Ves. 432, 442.

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## THE IDAHO.

93 U.S. 575. 1876.

MR. JUSTICE STRONG delivered the opinion of the court.

Now, what must be the legal effect of all this? What the effect of intermingling the twenty-five bales with the one hundred and forty that belonged to Porter, in such a manner that they could not be distinguished, and so completely that it is impossible for either party to identify any one of the one hundred and sixty-five bales as a part of the lot of twenty-five, or of the larger lot of one hundred and forty, shipped on the "Colson"? We can come to no other conclusion than this: the right of possession of the whole was in Porter, and neither he who caused the confusion, nor any one claiming under him, is entitled to any bale which he cannot identify as one of the lot of twenty-five. It is admitted, the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree, that if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part, of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a

fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in *Ryder v. Hathaway*, 21 Pick. 306. Such is the present case. The confusion of the bales of cotton was not accidental. It was purposely made. The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was, therefore, wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrong-doer to reclaim his own, if he can identify it, or to demand his proportional part. *Stephenson v. Little*, 10 Mich. 447. The libellants have made no attempt to identify any part.

NOTE. — If the mixture of units of unequal value is made in bad faith the wrong-doer forfeits all rights in the units belonging to him prior to the mixture. See *Jewett v. Dringer*, 30 N. J. Eq. 291; *Weaver v. Neal*, 61 W. Va. 57; *Jenkins v. Steanka*, 19 Wis. 126.

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### BRYANT v. WARE.

30 Me. 293. 1849.

TRESPASS *de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles, and juniper timber.

At the trial, before WELLS, J., it appeared, that the lumber was cut in the winter of 1840-41, by one Samuel Potter, a part on the land of defendant, and a part on land of Timothy Boutelle, the two tracts being contiguous in the town of Alton. The timber was hauled by Potter into a brook, for the purpose of being floated to market, and in the following spring it was run down to the Penobscot River above the town of Orono, where it was rafted into eleven rafts, six of which were run to Bangor immediately afterwards, and delivered by Potter to plaintiff, to be held by him to pay what Potter owed him, and the balance to be paid to Potter, the plaintiff having supplied Potter while cutting the lumber. The other rafts were taken by defendant Lear Oldtown as his property, and soon afterwards he came to Bangor, and took the remaining six rafts out of the possession of plaintiff.

Potter was a trespasser on both tracts, and there were no marks upon any of the timber.

With other rulings, the Court instructed the jury, that if a part of the lumber was cut on Ware's and a part on Boutelle's land, and

was all mixed together in such a manner, by those who cut it, that the part cut on Ware's land could not be distinguished from what was cut on Boutelle's land, then Ware had a right to take the whole, and this action of trespass could not be maintained; also, that if the rafts taken by the defendant near Oldtown, contained more than all the timber cut from his land, it would make no difference *where* he took it (he intending to take all the timber cut as aforesaid), if they found that the timber was intermingled, and could not be distinguished as before stated.

~~The jury returned a verdict for defendant, and the plaintiff excepted.~~

HOWARD, J. This was an action of *trespass de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles and juniper timber. There was evidence, as stated in the exceptions, tending to show that the lumber was cut in the winter of 1840-41, by Samuel Potter, a trespasser, on two contiguous tracts of land, and hauled into a brook, to be floated down to a market. That one of the tracts of land was owned by the defendant, and that the other, called the college land, was owned by Timothy Boutelle. That in the spring following, the timber was run down to the Penobscot River and rafted into eleven rafts, six of which were run to Bangor, immediately after by Potter, and "delivered to the plaintiff to pay him what Potter owed him, and the balance to be paid to Potter (the plaintiff having supplied Potter while cutting the lumber)." "That Potter was a trespasser on both lots, on which he cut the timber"; and that "there was no other intermingling of the timber cut from both tracts, except that the logs were hauled into the same brook, at the same landing, and afterwards rafted into the same rafts, there being no marks on any of the timber."

The defendant took the five rafts at Oldtown, as his property, and soon after took the remaining six rafts out of the possession of the plaintiff, at Bangor.

The instructions to the jury, to which exceptions were taken and urged in the argument, were: —

1. That, if a part of the lumber was cut on the defendant's land, and a part on the college land, and the whole was mixed together in such a manner, by those who cut it, that it could not be distinguished, the defendant had a right to take the whole, and that this action of trespass could not be maintained.

2. That if the defendant did take the five rafts at Oldtown, and if they amounted to more than all of the timber cut from his land, it would make no difference where he took it, if he intended to seize all of the timber cut as before mentioned, if they found that it was intermingled, and could not be distinguished as before stated.

If one take the goods of another, as a trespasser, he does not thereby acquire a title to them, and cannot invest another with

a title; but the original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him, so long as the identity can be established.

If the timber taken by Potter, as a trespasser, from the land of the defendant, was so mingled with the other timber taken by him from the college land, that it could not be distinguished, it would produce what is denominated a confusion of goods. *Loomis v. Green*, 7 Greenl. 393; *Wingate v. Smith*, 20 Maine, 287; *Hazeltine v. Stockwell*, 30 Maine, 237; *Ryder v. Hathaway*, 21 Pick. 298; *Willard v. Rice*, 11 Metc. 493; *Betts v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 168; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax*, 7 Cowen, 95; *Treat v. Barber*, 7 Conn. 280; *Barron v. Cobleigh*, 11 N.H. 558.

Where the confusion or commixture of goods is made by consent of the owners, or by accident, and without fault, so that they cannot be distinguished, but the identity remains, each is entitled to his proportion.

This was also the doctrine of the civil law. (Just. Inst. Lib. 2, tit. 1, §§ 27, 28.)

But if such intermixture be wilfully or negligently effected by one, without the knowledge or approbation of the other owner, the latter would be entitled by the common law to the whole property, without making satisfaction to the former for his loss. The civil law, however, required the satisfaction to be made. *Browne's Civil Law*, 243; *Ward v. Ayre*, Cro. Jac. 366; 2 Black. Com. 405; 2 Kent, Com. 363, 364, where the civil law is stated differently by the learned chancellor, page 364; *Story's Com. on Bailments*, § 40; *Lupton v. White*, 15 Vesey, 440; *Hart v. Ten Eyck*, 2 Johns. Chan. 62.

If the defendant found his timber, which had been wrongfully taken from his land, mingled with other timber, in the manner stated in the evidence, so that it could not be distinguished, he had clearly a right to take possession of the whole, without committing an act of trespass, even if he may be held to account to the true owner for a portion of it. He had, at least, a common interest in the property, and in taking possession he asserted only a legal right. Inst. Lib. 2, tit. 1, § 28; *Story's Com. on Bailments*, § 40.

In any view of the case, upon the facts presented, the instructions were correct.

*Exceptions overruled.*

## CHAPTER VI.

## SATISFACTION OF JUDGMENT.

## BRINSMEAD v. HARRISON.

L. R. 6 C. P. 584. 1871.

WILLES, J. We decided yesterday that, according to the law laid down by Lord Wensleydale in *King v. Hoare*, 13 M. & W. 494, a judgment in an action against one of two joint tort-feasors is a bar to an action against the other for the same cause. There remains, however, an entirely different question, which arises upon the new assignment, and which is, whether a judgment in trover, without satisfaction, changes the property in the goods so as to vest the property therein in the defendant from the time of the judgment, or of the conversion, or whether such recovery operates as a mere assessment of the value, on payment of which the property in the goods vests in the defendant. It is obvious that this is a different question from that which we have already disposed of; because, if the mere recovery vests the property in the defendant, the property is equally changed as to all strangers. It is a question which affects the transfer of property generally.

We are of opinion that no such change is produced by the mere recovery. The proceeding in such an action is not a proceeding *in rem*: it is, to recover *prima facie* the value of the goods. It may be that the goods have been returned, and the judgment given for nominal damages only. To say in such a case that the mere obtaining judgment vests the property in the defendant would be an absurdity. It is clear, therefore, that the judgment has no specific effect upon the goods. The only way the judgment in trover can have the effect of vesting the property in the defendant is, by treating the judgment as being (that which in truth it ordinarily is) an assessment of the value of the goods, and treating the satisfaction of the damages as payment of the price as upon a sale of the goods, according to the maxim in Jenk. 4th Cent. Case 88. Any other construction would seem to be absurd.

This question whether the property is changed by the mere recovery in trover appears to have led to much difference of opinion. The authority mainly relied upon by Mr. Powell was the dictum of JERVIS, C.J., in *Buckland v. Johnson*, 15 C. B. 145, 157; 23 L. J. (C.P.) 204, in which that very learned and accurate judge did lay it

down, upon the authority of a case in *Strange*, *Adams v. Broughton*, 2 Str. 1078, that the property is changed by the mere recovery, without any satisfaction. I would observe, however, that the case, as reported in *Strange*, is far from satisfactory. It is also reported in *Andrews*, p. 18, where the case is thus stated: — "An action of trover was brought by the present plaintiff against one Mason, wherein he obtained judgment by default, and afterwards had final judgment; whereupon a writ of error was brought. And another action was now brought against Broughton by the same plaintiff, and for the same goods for which the first action was brought." An application appears to have been made to hold the defendant in the second action to special bail; and there was sufficient reason why special bail should not be allowed, because the judgment against Mason had the effect of preventing a second action being maintained against Broughton. The loose expressions of the court, — that "the property of the goods is entirely altered by the judgment obtained against Mason, and the damages recovered in the first action are the price thereof; so that he hath now the same property therein as the original plaintiff had; and this against all the world," — were quite unnecessary. The same may be said as to the dictum of JERVIS, C.J., in *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. (C.P.) 204. That was an action against a person who jointly with his son had sold goods the proceeds of which the defendant had received. After the sale, the plaintiff (who claimed the goods), in ignorance that the father had received the money, brought an action against the son for money had and received and for damages for the conversion, and recovered a verdict for 100*l.* against him; but, not succeeding in obtaining satisfaction, in consequence of the son's insolvency, he brought a second action against the father for the same causes. It is clear that the proceedings in the first action amounted to an election to treat the matter as a wrong, and precluded the plaintiff from bringing a fresh action for money had and received. It was equally clear that the judgment in the first action was a merger of the remedy against either the father or the son; and, when the action was brought against the father, the answer was obvious. It was wholly unnecessary, therefore, to decide, as suggested by JERVIS, C.J., that the recovery in the first action changed the property; and what was said was properly treated by the reporter as amounting only to a "semble."

On the other hand, there is a series of decisions shewing that a mere recovery, without satisfaction, has not the effect of changing the property. In *Jenkins*, 4th Cent. Case 88, it is said: "A, in trespass against B for taking an horse, recovers damages; by this recovery, *and executio done thereon*, the property of the horse is vested in B. *Solutio pretii emptionis loco habetur.*" That doctrine is acted upon in *Cooper v. Shepherd*, 3 C. B. 266; and, though the marginal



note treats the *recovery* as changing the property, — a doctrine thrown out also in the note to *Barnett v. Brandao*, 6 M. & G. at p. 640, — the plea shews that the damages were satisfied; and the judgment of TINDAL, C.J., shews that the property vests in the defendant only “on payment of the damages.” To the same effect are the observations of HOLROYD, J., in *Morris v. Robinson*, 3 B. & C. 196, at p. 206, “Where in trover,” he says, “the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover.” To the same effect is the note in 2 Wms. Saund. 47 cc, n. (z). It may also be proper to refer to the note to the case of *Holmes v. Wilson*, 10 Ad. & E. at p. 511, in which the law is stated by the reporters probably at the suggestion of one of the judges. The good sense of the thing and abundant authority thus appearing, we feel bound to give judgment for the plaintiff upon the new assignment.

In order, however, to act upon our judgment of yesterday and to-day, it must be recollected that the present defendant will not be liable except in respect of a wrong other than that which was the subject of the action against the other wrong-doer.

Another point arises upon the new assignment. The plaintiff may have acquired the property in the goods after the recovery of the judgment in the former action. As, however, that point was not argued, we prefer resting our judgment upon the main point.

The judgment therefore will be for the defendant upon the sixth plea, and for the plaintiff upon the new assignment.

*Judgment accordingly.*

NOTE. — The law is clear to the effect that the satisfaction of a judgment for the full value of a chattel passes the title thereto to the defendant. But the judgment must be for the full value of the chattel. *Dearth v. Spencer*, 52 N.H. 213.

In most, but not all, jurisdictions the entry of such judgment does not pass the title to the defendant. See, in accord with the principal case, *Spivey v. Morris*, 18 Ala. 254; *Atwater v. Tupper*, 45 Conn. 144; *Frick v. Davis*, 80 Ga. 482, 485; *Hepburn v. Sewell*, 5 Harr. & J. (Md.) 211, *infra*; *Miller v. Hyde*, 161 Mass. 472, *infra*; *Tolman Co. v. Waite*, 119 Mich. 341; *Smith v. Smith*, 51 N.H. 571; *Singer Manufacturing Co. v. Skillman*, 52 N.J. L. 263; *Osterhout v. Roberts*, 8 Cowen (N.Y.), 43; *Lovejoy v. Murray*, 3 Wall. (U.S.) 1, 16. But see, *contra*, *Merrick's Estate*, 5 W. & S. (Pa.) 9, 17; *Rogers v. Moore*, Rice, Law (S.C.), 60; *Murrell v. Johnson's Admr.*, 1 Hen. & M. (Va.) 449.

## MILLER v. HYDE.

161 Mass. 472. 1894.

REPLEVIN of a horse. Writ dated August 10, 1892. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on agreed facts, in substance as follows.

The horse in question was purchased in July, 1890, by Herbert W. Miller, a resident of Boston, through his agent, George Bryden, of Hartford, in the State of Connecticut, who thereafter kept it for him in Hartford. Miller died in September, 1890, and in the following November the plaintiff, who was his widow, having been appointed administratrix of his estate, demanded the horse of Bryden, who refused to deliver it to her, claiming to own a half interest therein. In March, 1891, Bryden sold and delivered the horse as his own property to Joseph C. Davenport and Ada L. Hyde, both residents of Connecticut.

Ancillary administration was subsequently granted to the plaintiff in Connecticut, and in November, 1891, she brought an action in that State against Bryden, Davenport, E. A. Hyde, and one Shillinglaw, for the conversion of the horse, which was in the possession of the three last named defendants, and attached the horse upon mesne process. She recovered judgment against Bryden only, on which execution was issued and delivered to an officer, who, after an ineffectual demand on Bryden for its payment, levied on the horse and advertised it for sale, but before he had sold it it was replevied from him by Davenport.

In August, 1892, Davenport intrusted the horse to the defendant, who brought it into this Commonwealth, where it was replevied by the plaintiff. When this action was begun, the judgment recovered in trover against Bryden, who was financially worthless, remained unsatisfied, and the replevin suit of Davenport against the officer was still pending in Connecticut.

The case was argued at the bar in December, 1893, and afterwards was submitted on the briefs to all the judges.

BARKER, J. The plaintiff may maintain replevin if she is the owner of the horse, and if she is not estopped from asserting her ownership against the defendant. As administratrix of her husband's estate, she was the owner when she brought trover in Connecticut against Bryden, the bailee, who had wrongfully usurped dominion, and sold and delivered the horse to Davenport. As the horse was in Connecticut and the action of trover was in the courts of that State, the effect of the suit upon her title would be determined by the law of the forum. But as the law of Connecticut is not stated as an agreed fact, we must apply our own. Whether a plain-

✓ tiff's title to the chattel is transferred upon the entry in his favor of judgment in trover has not been decided by this court. Assuming that in early times title to the chattel was transferred to the defendant upon the entry of judgment for the plaintiff in trover, at present a different doctrine is generally applied, and it is now commonly held that title is not transferred by the entry of judgment, but remains in the plaintiff until he has received actual satisfaction; see *Atwater v. Tupper*, 45 Conn. 144; *Turner v. Brock*, 6 Heisk. 50; *Lovejoy v. Murray*, 3 Wall. 1; *Ex parte Drake*, 5 Ch. D. 866; *Brinsmead v. Harrison*, L. R. 7 C. P. 547; 1 Greenl. Ev. § 533 and note; and the law has been commonly so administered by our own trial courts. We think this doctrine better calculated to do justice, and see no reason why we should not hold it to be law.

Whenever the title passes, as there has been no sale or gift, and no title by prescription or by possession taken upon abandonment by the true owner, the transfer is made by his inferred election to recognize as an absolute ownership the qualified dominion wrongfully assumed by the defendant. The true owner makes no release in terms and no election in terms to relinquish his title; but the election is inferred by the law, to prevent injustice. Formerly this election was inferred when judgment for the plaintiff was entered, because his damages, measured by the value of the chattel and interest, were then authoritatively assessed, and the judgment brought to his aid the power of the court to enforce its collection out of the wrongdoer's estate or by taking his person; and this was deemed enough to insure actual satisfaction. If so, it was just to infer that when he accepted these rights he elected to relinquish to the wrongdoer the full ownership of the chattel. An election was not inferred when the suit was commenced, although the plaintiff then alleged that the defendant had converted the chattel, and although the writ might contain a *capias*, because, owing to the uncertainties attendant upon the pursuit of remedies by action, it was not just to infer such an election while ultimate satisfaction for the wrong was but problematical. Forms of action are a means of administering justice, rather than an end in themselves. When it is seen that the practical result of a form of action is a failure of justice, the courts will make such changes as are necessary to do justice. If the entry of judgment in trover usually gave the judgment creditor but an empty right, it was not just to infer that upon acquiring such a right he relinquished the ownership of the chattel, and the rule that required the inference to be then drawn was properly changed. The ground for inferring such an election was that upon the entry of judgment he acquired an effectual right in lieu of his property, and the doctrine that without some actual satisfaction the inference of an election would not be drawn has been shown by experience to be necessary to the administration of justice, and has been generally

acted upon, and the modern rule adopted that the plaintiff's title is not transferred by the entry of judgment, but is transferred by actual satisfaction. Trover is but a tentative attempt to obtain justice for a wrong, and until pursued so far that it has given actual satisfaction ought not to bar the plaintiff from asserting his title. The present doctrine is consistent with the general principle stated by Lord Ellenborough in *Drake v. Mitchell*, 3 East, 251, and quoted in *Vanuxem v. Burr*, 151 Mass. 386, 389, as approved in *Lord v. Bigelow*, 124 Mass. 185, that "a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party." Whether the holder of an unsatisfied judgment in trover can without a fresh taking maintain replevin against the same defendant, or is restricted to one action against the same person for a single tort, we do not now decide. See *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford & New Haven Railroad*, 2 Allen, 331; *Bliss v. New York Central & Hudson River Railroad*, 160 Mass. 447. If he is so restricted, it is not because the ownership of the chattel has been transferred.

But the present plaintiff has done more than to take judgment in trover. In her action of trover she caused the horse to be attached upon mesne process, and since obtaining judgment she has caused the horse to be seized as property of Bryden in execution on the judgment as his property, and to be kept and offered for sale on the execution until, as it was about to be so sold, it was replevied by Davenport from the officer in a suit between them which is still pending in Connecticut. That suit is not a bar to this action, because it is not between the same parties. *White v. Dolliver*, 113 Mass. 400; *Newell v. Newton*, 10 Pick. 470. But we must still inquire whether, assuming that the plaintiff's property in the horse was not transferred by her judgment in trover, it was transferred by that judgment taken in connection with the facts of the attachment and levy, and also whether she is estopped by the attachment and the levy from asserting her title in this action.

In the first place, the doctrine that a mortgagee of personalty who attaches the mortgaged goods on a writ against the mortgagor cannot afterwards enforce his mortgage, is not in point. The mortgagee is not the owner, but has merely a lien, and may well be held to relinquish that lien when by the attachment he establishes another. But if the plaintiff has actual ownership, and thus the full right to do with his own property as he may choose, merely procuring it to be attached on mesne process or seized on execution as the property of another does not work a change of ownership. The owner does not sell or give away his goods. In cases which are likely to occasion such conduct, there usually is, as in the present case, a disputed title; and it is with the hope of avoiding litigation over it that the real owner consents that the chattel shall for a special pur-

pose only be treated as the property of another. This is "consistent with an intention ultimately to assert title should circumstances render it desirable for him so to do"; and he may well wait to see the issue, which may be such as to avoid the litigation of the question of title. See *Mackay v. Holland*, 4 Met. 69, 74; *Dewey v. Field*, 4 Met. 381, 384; *Johns v. Church*, 12 Pick. 557; *Bursley v. Hamilton*, 15 Pick. 40, 43; *Edmunds v. Hill*, 133 Mass. 445, 446. Nor is there any good reason why such a use of his own property by a plaintiff in trover should be held to divest him of his ownership when it would not have that effect in other forms of action. In trover he is in legal effect asserting by his suit that the title is and will remain in himself until he receives satisfaction on a judgment, and his subjection of the chattel to attachment or to seizure on execution is simply a use which he chooses to make of his own property which does not divest him of title or hamper him in the subsequent assertion of his ownership except by the rules of estoppel. The case of *Ex parte Drake*, above cited, is an authority to the point that a plaintiff who has brought an action of detinue and taken judgment both for the detention and the value of the chattel, and has also proved his judgment in bankruptcy after having had the chattel seized on execution as the defendant's property, may nevertheless assert his ownership and have process to restore to him the chattel *in specie*. In such cases courts look to substance rather than form, and do not by inferring an election or a waiver deprive of his property a plaintiff who has unfortunately resorted to some futile method of procuring redress.

In the present case, the natural construction to be put upon the plaintiff's conduct in attaching and beginning a levy upon her own horse in a suit asserting her ownership is, that, while she contended that in fact the horse was her own, she consented that, if litigation as to the true state of title could be avoided by so selling the horse that the proceeds of the sale should be applied upon her claim for damages, she would in that event no longer assert her paramount title. Her implied offer not having been accepted, and Davenport having rendered impossible the accomplishment of her plan to avoid further litigation, she could thereupon say that all which had gone before was provisional upon the completion of the levy, and could enforce her right of property by any proper action against Davenport, or any one who might thereafter take wrongful possession of her horse, unless she was barred by the rules of estoppel.

Upon the question of estoppel, it is material to the decision of the present case to consider only whether she is estopped as to the present defendant or his principal Davenport. Whether she has rendered Bryden, or the officer who made the attachment or the levy in the Bryden suit, liable to costs, expenses, or chance of loss, is not material upon the question whether she is barred by the doctrines of

estoppel from maintaining the present action. She is now prosecuting one of several successive wrongdoers for a fresh interference with the possession of her property; and neither the present defendant, Hyde, nor Davenport, for whom he claims to be acting as agent, has done or suffered anything, or been put to any liability by reason of which the plaintiff should be estopped from asserting her title. Upon the facts, Davenport in taking the horse in replevin did not rely upon the attachment or levy, but acted in denial of their validity; and Hyde is not shown to have been influenced by them in consenting to become Davenport's agent in keeping the horse, or in any manner. Neither Hyde nor Davenport is shown to have changed his position or course of conduct relying upon the plaintiff's action in causing the attachment or the levy, and the plaintiff is not estopped by it from maintaining the present action. In the opinion of a majority of the court, the result must be,

*Judgment set aside, and judgment for the plaintiff ordered.*

HOLMES, J. As the judges are not unanimous it becomes necessary for me to state my views, which otherwise I should not do, as they have not persuaded my brethren.

I am of opinion that the plaintiff ought to be barred in this action by her recovery of judgment in trover for the same horse. I am aware that the doctrine that title passes by judgment without satisfaction is not in fashion, but I never have been able to understand any other. It always has seemed to me that one whose property has been converted has an election between two courses, that he may have the thing back or may have its value in damages, but that he cannot have both; that when he chooses one he necessarily gives up the other, and that by taking a judgment for the value he does choose one conclusively. He cannot have a right to the value of the thing, effectual or ineffectual, and a right to the thing at the same time. The defendant is estopped by the judgment to deny the plaintiff's right to the value of the thing. Usually estoppels by judgment are mutual. It would seem to follow that the plaintiff also is estopped to deny his right to the value of the thing, and therefore is estopped to set up an inconsistent claim. In general an election is determined by judgment. *Butler v. Hildreth*, 5 Met. 49; *Bailey v. Hervey*, 135 Mass. 172, 174; *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86; *Raphael v. Reinstein*, 154 Mass. 178, 179. I know of no reason why a judgment should be less conclusive in this case than any other. Of course, I am speaking of a judgment for the value of the chattel, not of one giving nominal damages for the taking. The argument from election is adopted in *White v. Philbrick*, 5 Greenl. 147, 150, which so far as I know is still the law of Maine, notwithstanding the remark in *Murray v. Lovejoy*, 2 Cliff. 191, 198. See also SHAW, C.J., in *Butler v. Hildreth*, 5 Met. 49, 53.

The most conspicuous cases which have taken a different view speak of the hardship of a man's losing his property without being paid for it, and sometimes cite the dictum in Jenkins, 4th Cent., Case 88, *Solutio pretii emptiois loco habetur*, which is dogma, not reasoning, or, if reasoning, is based on the false analogy of a sale; but they leave the argument which I have stated unanswered, not, as I think, because the judges deemed it unworthy of answer or met by paramount considerations of policy, but because they did not have either that or a clue to the early cases before their mind. *Lovejoy v. Murray*, 3 Wall. 1, 17; *Brinsmead v. Harrison*, L. R. 6 C. P. 584, 587; s. c. L. R. 7 C. P. 547, 554. It is not the practice of the English judges to overrule the common law because they disapprove it, and to do so without discussion. In *Brinsmead v. Harrison*, Mr. Justice WILLES thought he was proving that the common law always had been in accord with his position. So far as the question of policy goes, it does not seem to me that the possibility — it is only the possibility — of an election turning out to have been unwise, is a sufficient reason for breaking in upon a principle which must be admitted to be sound on the whole, and for overthrowing the doctrine of the common law by a judicial fiat. I am not informed of any statistics which establish that judgments for money usually give the judgment creditor only an empty right.

That the view which I hold is the view of the common law I think may be proved by considering what was the theory on which the remedies of trespass and replevin were given. In Y. B. 19 Hen. VI. 65, pl. 5, Newton says: "If you had taken my chattels it is at my choice to sue replevin, which shows that the property is in me, or to sue a writ of trespass, which shows that the property is in the taker; and so it is at my will to waive the property or not." In 6 Hen. VII. 8, pl. 4, Vavisor uses similar language, and adds, "And so it is of goods taken, one may devest the property out of himself, if he will, by proceedings in trespass, or demand property by replevin or writ of detinue," if he prefers. There is no doubt that the old law was that replevin affirms property in the plaintiff and trespass disaffirms it, and that the plaintiff has election. Bro. Abr. Trespass, pl. 134. 18 Vin. Abr. 69 (E). ANDERSON and WARBERTON, JJ., in *Bishop v. Montague*, Cro. Eliz. 824. The proposition is made clearer when it is remembered that a tortious possession, at least if not felonious, carried with it a title by wrong in the case of chattels as well as in the case of a disseisin of land, as appears from the page of Viner just cited, and as has been shown more fully by the learned researches of Mr. Ames and Mr. Maitland, 3 Harv. Law Rev. 23, 326. See 1 Law Quarterly Rev. 324. I do not regard that as a necessary doctrine, or as the law of Massachusetts, but it was the common law, and it fixed the relations of trespass and replevin to each other. Trespass, and on the same principle trover, proceed on the footing of affirming

property in the defendant, and of ratifying the act of the defendant which already has affirmed it. I do not see on what other ground a judgment for the value can be justified. If the title still is in doubt, or remains in the plaintiff, the defendant ought not to be charged for anything but the tortious taking. Again, cannot the plaintiff take the converted chattel on execution? And on what principle can he do so if it does not yet belong to the defendant?

I say but a word as to the practical difficulties of the prevailing rule. No doubt they can be met in one way or another. Suppose the plaintiff after judgment were to retake the chattel by his own act, it would strike me as odd to say that this satisfied the judgment, and as impossible to say that it satisfied the whole judgment, which was for the tort, as well as for the value of the property. Yet on the view which I oppose I presume that the judgment could not be collected. See *Coombe v. Sansom*, 1 Dowl. & Ry. 201.

It seems to me that the opinion which I hold was the prevailing one in England until *Brinsmead v. Harrison*. *Bishop v. Montague*, Cro. Eliz. 824. FENNER, J., in *Brown v. Wootton*, Cro. Jac. 73, 74; s. c. Yelv. 67; Moore, 762. *Adams v. Broughton*, 2 Strange, 1078; s. c. Andrews, 18, 19. *Buckland v. Johnson*, 15 C. B. 145, 157, 162, 163. Sergt. Manning's note to 6 Man. & Gr. 640. See *Lamine v. Dorrell*, 2 Ld. Raym. 1216, 1217. And I should add that I see a relic of the ancient and true doctrine in the otherwise unexplained notion that when execution is satisfied the title of the defendant relates back to the date of the conversion. *Hepburn v. Sewell*, 5 Har. & J. 211. *Smith v. Smith*, 51 N.H. 571, and 50 N.H. 212. Compare *Atwater v. Tupper*, 45 Conn. 144, 147, 148.

The only authorities binding upon us are the ancient evidences of the common law as it was before the Revolution and our own decisions. I have shown what I think was the common law. Our own decisions leave the question open to be decided in accordance with it. *Campbell v. Phelps*, 1 Pick. 62, 65, 70. *Bennett v. Hood*, 1 Allen, 47. Many cases in other States are collected in *Freem. Judgments* (4th ed.), § 237.

If I am right in my general views, they apply to this case. The plaintiff recovered her judgment in Connecticut, to be sure, as ancillary administrator there, but the horse was there, and she was entitled to it there, so that her judgment recovered there passed the title. Like any other transfer of a chattel valid in the place where it was made and where the chattel was situated, it will be respected elsewhere. The Connecticut law was not put in evidence, and therefore we must presume that a judgment there has whatever effect we attribute to it on the principles of the common law. It is not argued that the defendant stands any worse than Bryden, against whom the judgment was recovered and from whom the defendant's bailor bought the horse.



KNOWLTON, J. I am of opinion that the judgment in this case should be for the defendant. It is a general rule of law that when one is entitled to either of two inconsistent remedies for a wrong done him, the pursuit of one of them so far as to affect the interests of the other party is a conclusive election, and a waiver of the other. *Hooker v. Olmstead*, 6 Pick. 481. *Butler v. Hildreth*, 5 Met. 49, 53. *Arnold v. Richmond Iron Works*, 1 Gray, 434, 440. *Connihan v. Thompson*, 111 Mass. 270. *Washburn v. Great Western Ins. Co.*, 114 Mass. 175. *Ormsby v. Dearborn*, 116 Mass. 386. *Seavey v. Potter*, 121 Mass. 297. *Bailey v. Hervey*, 135 Mass. 172, 174. *Goodyear Dental Vulcanite Co. v. Caduc*, 144 Mass. 85, 86. *Raphael v. Reinstein*, 154 Mass. 178. It is under this rule that the owner of property wrongfully taken by another is held to be precluded from claiming it after he has elected to recover the value of it from the wrongdoer. The property passes, not because there has been a sale, but because the owner has elected to receive instead of it that which represents it, and because it would be unjust to permit him to take the property after having chosen the money which is its equivalent. The principal question in cases of this kind is at what stage of the proceedings the owner shall be deemed to have made an election that binds him. On principle, and as a general rule, he should be bound by the election he makes, if in making it he goes so far as to affect the rights or interests of the other party. It would be unjust, when he may proceed only in one or the other of two opposite directions, that he should go forward in one direction in such a way as materially to affect the other party, and then turn backward and go on in the other, and compel his adversary to satisfy him in a different way.

In very early cases it was held that the owner of property unlawfully taken makes a conclusive election of his remedy which passes the property as between the parties when he takes judgment for the value of it against the wrongdoer. He thereby puts his claim for property of which he chooses to say that he has been divested into the form of a debt apparent of record, for the satisfaction of which he may at any time have execution from the court.

But where nothing more is done than to take a judgment without security there are considerations which have led in many courts to a modification of the rule in favor of the owner. Sometimes when he brings his suit in trover he is unable to find the property, and very often his judgment for the value of it cannot be made available. In taking judgment he merely puts in form and settles by adjudication a claim for the value of the property, to which he was entitled from the beginning if he chose to enforce it. He does not otherwise disturb the defendant or his property, and, while it would doubtless be more logical to say that he is concluded by his election as soon as he has recovered judgment, it is perhaps a practical rule which will more generally work out justice to hold that if he does nothing

more to collect the money, and if he proceeds within a reasonable time, he may still take the property as his own. But if, having fixed the liability of the defendant for a debt by taking judgment, he says by his conduct that he intends to collect the debt, and does that which affects the interests of the defendant in that particular, he should be deemed to have made his election conclusive.

The cases which say that the rights of the parties in regard to the title are fixed, not by taking judgment, but by obtaining satisfaction, cannot mean that one may take judgment for the full value of the property, and collect one half or two thirds of the amount, and may afterward take and hold the property itself under his original title. Many of these cases were in jurisdictions where attachment on mesne process is not permitted, and where there is no security for a judgment when it is rendered. So far as I am aware, there is no case in which is considered the effect of taking judgment in a suit where there was an attachment which secured the collection of the judgment, or the effect of a partial satisfaction, or of a proceeding after judgment to enforce it by a levy on the property. It seems to me there is good ground for holding that, when one undertakes to collect the value of his property by making an attachment to secure the judgment which he may obtain, and then prosecutes his claim to judgment, he has done that which affects the rights of the other party far more than the mere recovery of a judgment on an unsecured claim. But however that may be, when after judgment the plaintiff proceeds to obtain satisfaction by a levy on the defendant's property, and much more when he levies on the property for the value of which he obtained judgment, and advertises it for sale as the property of the defendant, he should be held to have fixed his rights and the rights of the other party in regard to the title beyond his power to change them. By taking the defendant's property to satisfy the execution he subjects him to the legal costs and expenses attendant upon the levy, and deprives him of what otherwise he would have. Even if he afterwards returns the property, he puts upon him the risk of loss or depreciation in value while it is held. If the property had not been taken on execution, the defendant might have negotiated to obtain the means of satisfying the execution by disposing of the property, or he might have attempted to satisfy it in some other way. He may have relaxed his efforts, relying on the levy, and if the plaintiff is permitted to abandon the levy and proceed in another way he may ultimately suffer loss on account of what the plaintiff did. This is equally true whether the property is that for which the plaintiff recovered his judgment or not, and if it is the same the plaintiff's act is a distinct and positive assertion that the property is the defendant's by reason of his judgment and of his purpose to collect the judgment and to apply the proceeds of the property in the satisfaction of it. Unless the rule stated at the

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beginning of this opinion is to be abrogated altogether, it must be held that when a plaintiff has elected to take judgment for the full value of property converted, and has then levied the execution upon property of the defendant which is subject to be taken on execution — especially if it is the property converted — he is thereby precluded from reversing his election and taking the converted property under his original title.

The case of *Ex parte Drake*, 5 Ch. D. 866, cited in the opinion of the majority of the court, was an action of detinue, where by the terms of the judgment the plaintiff was to have either the property or the ascertained value of it.

If the plaintiff cannot abandon her judgment and levy, and reclaim the horse as against Bryden, she cannot as against this defendant, who is in privity with Bryden through Davenport, who is a *bona fide* purchaser from Bryden. So far as the pending proceedings in Connecticut under the levy and the subsequent replevin suit there affect the title, they are binding on the plaintiff here, for the officer was acting in enforcement of her rights by her direction, and she is therefore in privity with him. His relation to her is very different from that of a mere bailee.

The Chief Justice concurs in this opinion.

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### *Ex parte* DRAKE.

L. R. 5 Ch. Div. 866. 1877.

THIS was an appeal from a decision of Mr. Registrar PEPYS, sitting as Chief Judge in Bankruptcy.

In March, 1875, James Ware, a carrier and carman, hired a grey mare of Daniel Drake. He neglected to return the mare when required by Drake to do so, and in May, 1876, Drake commenced an action in the Exchequer Division against Ware for the recovery of the mare. The action was tried on the 2d of December, 1876, when a verdict was found for the Plaintiff for £60, the value of the mare, such amount to be reduced to 1s. if the mare was returned to the Plaintiff on the 4th of December, and £25 damages for the wrongful detention. And the Judge directed judgment for £85, and the costs of the action. The Defendant did not return the mare, and on the 6th of December, the Plaintiff's solicitor's bill of costs was taxed at £70 10s. 2d. At an earlier hour on the same day Ware had filed a liquidation petition, and notice of the petition was given to the Plaintiff's solicitor by Ware's solicitor when they attended the taxation. On the same day Drake signed judgment in the action for £155 10s. 2d., and issued and lodged with the sheriff of Middlesex a writ of *fi. fa.* on the judgment. On the 7th of December the sheriff

levied on the goods of Ware, not including the mare. An order was afterwards made by the Court of Bankruptcy restraining the proceedings under the execution, and the sheriff withdrew. The first meeting of the creditors was held on the 5th of January, 1877, when Drake tendered a proof. His affidavit stated the verdict in the action, the signing of judgment, the taxation of the costs, and that the mare had not been delivered to him, nor the £85, or the amount of the taxed costs, paid to him. The affidavit went on to state that Ware was also, at the date of the institution of the liquidation proceedings, and still was, indebted to him in the sum of £264 for hire of the mare from the 25th of March, 1875, to the 2d of December, 1876, for which sum he had not received any satisfaction or security. He further said that he had not received any satisfaction or security for the amount recovered by him under the judgment, except so far as the same was secured by the goods levied upon by the sheriff. This proof was objected to by the debtor, on the ground, as to the £264, that an action was pending in the Common Pleas Division by the debtor against Drake, in which Drake had set up a counterclaim for £100 for hire of the mare, upon which issue had been joined, and as to the costs claimed, on the ground that the judgment was not produced. This objection was marked on the proof and signed by the chairman at the meeting. Drake voted at the meeting. The proof was afterwards objected to by the trustee in the liquidation, as to the £264, on the ground that no contract for hire was ever entered into by the debtor. On the 10th of January, 1877, Drake applied to the Court in the liquidation for an order that the trustee should deliver to him the goods which had been seized by the sheriff, or that he should, out of the first assets belonging to the estate of Ware which should come to his hands, pay to Drake the £155 10s. 2d. due to him under the judgment, with interest until payment. This motion was by consent turned into a special case. Upon the hearing of the case on the 13th of February, the Registrar decided that Drake was not entitled to any relief. At this time Drake did not know where the mare was. But on the 13th of March he accidentally discovered her in the possession of the debtor, whose servant was driving her. The debtor was, with the permission of the trustee, using her in his business. Drake thereupon instructed the sheriff to seize the mare under the writ of *fi. fa.*, and the sheriff on the same day forcibly removed her from the debtor's possession. On the 14th of March the trustee obtained in the Court of Bankruptcy an interim injunction restraining the sheriff and Drake from selling the mare, and on the 27th of March the registrar made this injunction perpetual, and ordered that the mare should be forthwith delivered up to the trustee.

Drake appealed.

JESSEL, M.R.:—

The first question which we have to decide is one which is simple enough to state—in whom was the property in this grey mare at the time when she was taken possession of by the sheriff? The property was originally in Drake. She had been hired from him by Ware, the liquidating debtor. The hiring was put an end to; the debtor was requested by Drake to return her, and he failed to do so. The action of detinue was brought by Drake, and he recovered judgment in the ordinary form. After that the plaintiff issued execution on his judgment, but the execution was defeated by the prior act of bankruptcy which overrode it, so that the plaintiff got nothing by his execution. After the filing of the liquidation petition he took in what has been called a proof for the judgment debt and the costs of the action. Some time after this he accidentally saw the mare in the possession of the debtor's servant, and he directed the sheriff's officer to seize her under the old writ. This was not a proper mode of proceeding. The trustee then obtained from the registrar the order for an injunction, and for the delivery of the mare to him; and from that order the appeal is brought. The first question is, in whom was the property in the mare when she was seized by the sheriff's officer? I am of opinion that, after the decision in *Brinsmead v. Harrison*, Law Rep. 7 C. P. 547, we are bound to hold that the property was never divested from Drake. He had the property unless something which he did under the judgment divested it from him. It is clear that the judgment itself did not divest the property. Did the execution divest it? Upon that question the authority of *Brinsmead v. Harrison* is distinctly in point. It shews that the execution does not divest the property unless there is satisfaction of the judgment. There are several ways in which an execution might produce nothing. One way would be if the amount produced by the sale of the goods seized did not cover the expenses of the sale. Another way would be if, as happened in the present case, there was a prior act of bankruptcy which nullified the execution. The judgments in *Brinsmead v. Harrison*, and especially that of Mr. Justice WILLES, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the plaintiff's goods to the defendant. The plaintiff wants to get his goods back, and the court gives him the next best thing, that is, the value of the goods. If he does not get that value, then he does not lose his property in the goods. On the appeal to the Exchequer Chamber, in *Brinsmead v. Harrison*, the only two judges who expressed any opinion on the point confirmed the view of Mr. Justice WILLES. Mr. Justice BLACKBURN said: "I observe that the Court of Common Pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is

unnecessary to express an opinion upon it." And Mr. Justice LUSH said: "The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrongdoers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the court below upon both points." Therefore one judge entirely agreed with Mr. Justice WILLES, and the other was inclined to agree with him. Under these circumstances we must consider it established that the property in the mare remained in the plaintiff Drake. That being so, he had a right to obtain possession of his property either by taking it peaceably or by means of proper legal process. As I understand the provisions of sect. 78 of the Common Law Procedure Act, 1854, the plaintiff (assuming that there had been no liquidation petition), if the value of the mare had not been paid to him under the judgment, and if he could have found out where the mare was, might have applied to a judge at chambers for an order that the defendant should deliver her to him. The liquidation petition prevented him from doing that, but the power of the judge at chambers became then vested in the Court of Bankruptcy, which could do complete justice in the matter. The plaintiff Drake, therefore, if he had applied to the Court of Bankruptcy, might have obtained an order for the delivery of the mare to him. But it is said that he cannot do this now, because he is bound by the proof which he made in the liquidation. If that means anything it means this, that the plaintiff has deliberately elected to take his chance of a dividend in the liquidation in substitution for his right to recover possession of his mare. It would be very extraordinary if he had done this, but of course it is possible that he may have done it, and we must examine what he actually did in order to see whether he has really made this election. He has done nothing beyond bringing in a proof. The proof has not been formally admitted by the trustee, though, on the other hand, it has not been rejected. But, before a reasonable time had elapsed after the proof was taken in, the plaintiff made a claim to be paid in full the whole amount of his judgment, that is, he made a claim for the full value of the chattel. This was a proceeding wholly inconsistent with the notion that he had finally elected to take the dividend instead of the mare, and I am of opinion that he had made no such election. The result is that the order of the registrar must be discharged, and we must now make the order which he ought to have made, that is, that the mare be delivered to or retained by the appellant. But, inasmuch as his proceedings in directing the sheriff to seize the mare were not such as can be viewed with approbation by the court, the proper order as to costs will be that there be no costs on either side, either of the hearing before the registrar or of the appeal

JAMES, L.J.:—

I am of the same opinion. I think it is not the business of any court of justice to find facilities for enabling one man to steal another man's property. That is really what we are asked to do by the respondent. The appellant desired to get his mare back. He brought his action of detinue, and he obtained a judgment, the effect of which was that the defendant was to pay the value of the mare or give her up. The trustee seems to think that because the defendant has become bankrupt, he can keep the value and not give up the animal. It is impossible to hold that that can be right, and I am very glad to find that we have the authority of the Courts of Common Pleas and Exchequer Chamber for saying that such is not the state of the law of England. I agree also with the Master of the Rolls that in the present case there has been no election by the appellant to take a dividend in lieu of his judgment. A man does not elect himself out of his property in this sort of way. I agree also that the sheriff ought not to have been put in motion to take the mare away from the trustee, who, rightly or wrongly, had got possession of her. But for this improper act the appellant will be sufficiently punished by losing all his costs.

BAGGALLAY, L.J., concurred.

NOTE. — See *Goff v. Craven*, 34 Hun. (N.Y.) 150. The plaintiff recovered judgment for the full value of the chattel, execution was issued, and the defendant was arrested and imprisoned for thirty days. The judgment remained unsatisfied, and the court held that the plaintiff continued to be the owner of the chattel.

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### HEPBURN v. SEWELL.

5 Harr. & J. (Md.) 211. 1821.

DORSEY, J., delivered the opinion of the court.

The appellant in this cause, as administrator of Jane Fishwick, instituted an action of trover in Prince George's County Court, to September term 1812, against the appellee, to recover the value of certain negroes, among whom were Sall, Patt, and Phillis, the property of the appellant's intestate, and obtained a verdict for the sum of \$7158.50, on which judgment was rendered. The appellee appealed from that judgment to the Court of Appeals, and the same was affirmed at June term 1818, and the amount of the judgment, with costs, was paid by the appellant to the appellee, before the trial, but after the issue was joined in the present suit. After the commencement of the action of trover, in which the verdict was rendered, the slaves Sall, Patt, and Phillis, each had a child, and the present action of trover was instituted by the appellant to recover the value

of the said children. The court below decided that the action could not be maintained, and this court concur in that decision. The British authorities lay down the general proposition, that if the plaintiff in an action of trover has recovered damages for the conversion of the goods, the property thereof vests in the defendant, who, as damages to the value have been recovered against him, is to be considered as a purchaser. *Adams v. Broughton*, 2 Strange, 1078. 6 Bacon's Abridgment, title "Trover," letter A, page 679. This court are of an opinion, that the judgment *per se* doth not clothe the defendant with the legal character of a purchaser, but that the judgment, and its fruit, to wit, the payment of the amount thereof, must both concur, to vest the right of property in the defendant. But the question occurs, to what epoch shall the title of the defendant relate on his satisfying the amount of the judgment? and we think his title relates back to the time of conversion. If the thing converted should, from any cause whether natural or artificial, be destroyed during the interval intervening between the period of conversion and the payment of the judgment, the loss must be sustained by the defendant; and it would seem to follow, that if the thing should improve in value during that period, the benefit ought to enure to the defendant, on the principle *qui sentit onus, sentire debet et commodum.* It must be borne in mind that the plaintiff in an action of trover compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant, as a purchaser, must therefore be considered as coeval with the period of conversion, and this right being consummated by the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement. The generality of our expressions must not be misunderstood; we do not mean to decide that in all cases of trover the payment of the damages assessed vests the right of property in the defendant. Thus, if property converted is returned and received by the owner before the institution of an action of trover, as damages could only be given for a partial conversion, the payment thereof would not divest the right of property out of the plaintiff, and vest it in the defendant.

*Judgment affirmed.*

NOTE. — See, accord, *Griel Bros. v. Pollak*, 105 Ala. 249; *Smith v. Smith*, 51 N.H. 571; *Acheson v. Miller*, 2 Ohio St. 203, 206. But cf. *Atwater v. Tupper*, 45 Conn. 144, 147; *Third National Bank v. Rice*, 161 Fed. 822.



## CHAPTER VII.

### GIFTS INTER VIVOS.

#### COCHRANE v. MOORE.

L. R. 25 Q. B. D. 57. 1890.

FRY, L.J. The law enunciated by Bracton in his book "de acquirendo rerum dominio," seems clear to the effect that no gift was complete without tradition of the subject of the gift. "Item oportet," he says (vol. i, p. 128), "quod donationem sequatur rei traditio, etiam in vita donatoris et donatorii; alioquin dicetur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (p. 300): "Item non sufficit chartam esse factam & signatam nisi probetur donationem esse perfectam, & quod omnia, quæ donationem faciunt, ritè præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quodd charta ritè facta sit, & vera & bona & cum solemnitate recitata & audita, tamen nunquam valebit donatio nisi tunc demum cum fuerit traditio subsequuta, & sic poterit charta esse vera, sed sine facta seysina, nuda." And to the same effect is another passage in chapter xviii, p. 310.

In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham (Select Pleas in Manorial Courts, p. 142; see also Professor Maitland's papers on the Seizin of Chattels, the Beatitude of Seizin, and the Mystery of Seizin: Law Quarterly Rev., i, 324; ii, 484; iv, 24, 286) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognised was between things corporeal, and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as

essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect. (Inst. ii, vii.)

Coming next to the great law-writers of the reign of Edward I, they hold language substantially the same as that of Bracton, except indeed that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. "Donatio," says Fleta, "est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut rem a vero ejus possessore ad alium transferatur. Dare autem est rem accipientis facere cum effectu, alioquin inutilis erit donatio, cum irritari valeat et revocari." (Lib. iii, c. 3.) He then proceeds to discuss various kinds of gifts, and says: "Alia perfecta, et alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondum fuerit subsecuta." (Loc. cit.; see also Lib. iii, c. 15.)

In Lib. iii, c. 7, he discusses the necessary elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shewn, because, according to Fleta, a promise made without duress followed by delivery under duress is not a valid gift. "Refert tamen," he says, "utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promisero, et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus."

Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman-French of the original. In his chapter on Gifts (Lib. ii, c. 3), he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made, if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested" (pp. 220, 221).

And again (Lib. ii, c. 3): "Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in case of gifts granted, whereof no livery of seisin follows" (pp. 225-226).

Passages of similar import will be found in Lib. i, c. 29, and Lib. ii, c. 8.

The third writer of the age of Edward I is one of a very different character from Fleta and Britton — we mean Horn, the author of the *Mirror of Justices*; he attacked the judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the 155 abusions or abuses of the law which stirred his soul to wrath, some relate to seisin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms that "the law requires but three things in contracts: 1. The agreement of the wills; 2. Satisfaction of the donor; 3. Delivery of the possession and gift" (chap. v, sect. 1, para. 75).

In the reign of Edward IV a step seems to have been taken in the law relative to gifts which resulted in this modification: that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

Thus in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by CHOKE and other justices that if a man executes a deed of gift of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a court of record.

In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, etc., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, etc. But the court said that such a gift is not good without notice, for a man cannot give his goods to me against my will.

An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. 4, pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the court was engaged in considering the sufficiency of his pleas. In the course of the discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seized of them, a stranger takes them away, have you not a writ of trespass against the stranger?" Which he then proceeds to answer. "Yes, Sir, for by the gift at once the prop-

erty was in you and the possession by the writ is adjudged in you presently." DANBY, the Chief Justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (*car la si vous pled. vr. matter accord, et justif, et vous confess. prisel hors de son poss.*). But immediately after this discussion Laicon found his argument so hopeless (*videns opinionem curiæ contra eum*) that he seems to have amended his pleadings.

This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to shew whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to which occurred a few years later seem to shew that the effect of a deed in passing the property without delivery of the chattel was claiming the attention of the lawyers of that day.

Brooke, in his *Abridgment* (Trespass, 303), cites this case of the 2 Edw. 4, and seems to put it upon a somewhat different ground to the Year Book itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting.

This case, as explained by Brooke, seems to underlie the proposition asserted twice in the case of *Hudson v. Hudson*, Latch. 214, 263, discussed in 2 Wms. Saunders, 47, a, to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them I can bring trespass; for property, it was added, draws possession in chattels personal. The court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by the will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made: and this point was not material to the matter under consideration by the court. Moreover, where a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV must be mentioned. In Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55, it was said by BRIAN, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant and then he could have his law — quod fuit concessum. The case appears to go only to this, that if A after bailing a chattel to B, then gives it to B, B might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII perhaps requires consideration (Hilary Term, 21 Hen. 7, pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs: "If I give to a man my cow or my horse, he may take the one or the other at his election: and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which emphasizes the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee, can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry.

It was in the reigns of the early Tudors that the action on the case on indebitatus assumpsit obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a value consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery.

This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested,

owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign (see Plowd. 11 b, and see a learned note, 2 Man. & Ry. 566).

*Flower's Case*, Noy 67, which seems to have been decided in 39 Elizabeth (see p. 59), appears to shew that the necessity of delivery was then upheld by the court. The case is thus stated by Noy (p. 67): "A borrowed one hundred pound of B, and at the day brought it in a bagg and cast it upon the table before B and B said to A, being his nephew, I will not have it, take it you and carry it home again with you. And by the court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of B, and A might well wage his law. By the court, otherwise it had been, if A had only offer'd it to B, for then it was chose in action only, and could not be given without a writing."

The court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew — so that the nephew might wage his law, i.e., might conscientiously swear that he was not indebted to his uncle. (See the case discussed in *Douglas v. Douglas*, 22 L. T. (N.S.) 127.)

In Jenkins's Centuries (3d Century, Case ix), it is said: "A gift of anything without a consideration is good: but it is revocable before the delivery to the donee of the thing given. *Donatio periclitur possessione accipientis*. This is one of the rules of law": — a statement made with little reference to the other matters treated of in the case. We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says, "always accompanied with delivery of possession and takes effect immediately." "But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract; and this a man cannot be compelled to perform" (Book 2, c. 30).

In 1818, the year before *Irons v. Smallpiece*, 2 B. & A. 551 was decided, the then Master of the Rolls, Sir Thomas Plumer, in *Hooper v. Goodwin*, 1 Sw. 485, 491, said: "A gift at law or in equity supposes some act to pass the property: in donations inter vivos . . . if the subject is capable of delivery, delivery."

These are, so far as we can find, all the relevant authorities before the decision in *Irons v. Smallpiece*, though they are not all the authorities that have been cited as relevant. But several that have

been relied upon appear to us to have no real bearing on the point at issue. Thus in *Wortes v. Clifton*, Roll. 61; Mich. 12 James 1, Coke arguendo uses as an illustration of the difference between the civil law and ours — that in the civil law a gift is not good without tradition — but that it is otherwise in our law. Here for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed.

In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery (*Perkins' Profitable Book*, Grant, 57; 2 *Shep. Touchs.* 227; *Comyn Digt. Biens* D 2) have been cited as if they likewise asserted that a gift was good without delivery — a proposition which they do not affirm, or, as we think, imply.

This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery: that on that law two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery.

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### TENBROOK v. BROWN.

17 Ind. 410. 1861.

APPEAL from the Parke Common Pleas.

WORDEN, J. Suit by Tenbrook against Brown. Judgment for the plaintiff, who appeals in consequence of the smallness of the verdict and judgment.

Tenbrook was one of the heirs and distributees, through his mother, of Samuel Brown, deceased, and the defendant, Brown, was a son of the deceased, and his executor. The complaint sought distribution to the plaintiff of his share of the estate. The controversy in the case grew, mainly, out of the fact that the defendant claimed the most of the personal property, supposed to have been left by the deceased, as having been given to him by the deceased in his lifetime.

We will notice the points relied upon in the brief of counsel for a reversal.

At the proper time, the plaintiff asked the following instructions to the jury, viz.: —

"4. That if the jury believe from the evidence that the property claimed as a gift by the defendant, was in the possession of the defendant as agent or manager for defendant's father, before the time

the gift is claimed to have been made, and no apparent change of ownership or control had taken place after that time, there is no valid gift." This charge was refused as asked, but given, striking out the words, "there is no valid gift," and adding, "it is evidence tending to prove that there had been no gift."

We are of opinion that the fourth charge, as asked, was properly refused; and that as given, it was as favorable to the plaintiff as he could legally claim.

~~There can be no doubt that delivery is necessary to pass the title to a chattel by gift.~~ Chancellor Kent says on this subject, "Delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundam subjectum materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part, not only with the possession, but with the dominion of the property." 2 Kent's Com., 3d Ed., p. 438.

Now, it seems clear enough that if the property in question was in the possession of the defendant, as agent or manager for his father, at the time of the gift, still, his father might execute to him a valid gift of the property while thus in his possession. The law clearly would not require, in such case, that the defendant should first surrender his actual possession to his father, in order that his father might redeliver the property to him in execution of the gift. It would seem that in such case the gift would be complete, if the father bestowed the property upon the defendant and relinquished all dominion and control over it, and recognized the defendant's possession thereof as being in his own right; and if the defendant, on his part, accepted the gift, and retained possession of the property in virtue thereof, with his father's consent. Actual delivery could not be made, without first going through the useless formality of surrendering up possession, because possession was already in the defendant. Such acts as above indicated would seem to be equivalent to a delivery, and to be sufficient to vest the property in the donee.

It seems to us that all this might have been done, and yet that there might not have been, in the language of the charge asked, any "apparent change of ownership or control," after the gift. The charge implies that there must have been such a change of ownership or control as would be "apparent" to the world. The defendant, as is assumed in the charge, having the possession of the property at the time of the gift, we think the gift might be valid, although there was no such apparent change of the ownership or control thereof. There might have been a real change of ownership, and of the capacity in which the defendant controlled the property, which appearances would not necessarily indicate. This is a question between an



heir of the donor and the donee. If the rights of creditors of the donor were involved, the question might admit of a different solution.

NOTE. — See, in accord with the principal case as to the manner in which the bailee of a chattel may be made the donee thereof, *Wing v. Merchant*, 57 Me. 383; *Miller v. Neff*, 33 W.Va. 197, 207; *Winter v. Winter*, 4 L. T. (N.S.) 639; *In re Alderson*, 64 L. T. (N.S.) 645. See also *Allen v. Cowan*, 23 N.Y. 502; *Kilpin v. Ratley*, [1892] 1 Q. B. 582.

### BICKFORD v. MATTOCKS.

95 Me. 547. 1901.

SAVAGE, J. Delivery may be made to the donee; or, as is commonly, but somewhat loosely said, it may be made to a third person for the donee, or for the use of the donee. *Borneman v. Sidlinger*, 15 Maine, 429; *Hill v. Stevenson*, 63 Maine, 364; *Dole v. Lincoln*, *supra*.

Not every delivery to a third person is a delivery for the donee, or for the use of the donee, in the sense in which these phrases are used in the cases cited. There may be a delivery to a third person which constitutes him the agent of the donor, and there may be a delivery which constitutes him a trustee for the donee, and the distinction lies in the intention with which the delivery is made. If the donor deliver the property to the third person simply for the purpose of his delivering it to the donee as the agent of the donor, the gift is not complete until the property has actually been delivered to the donee. Such a delivery is not absolute, for the ordinary principle of agency applies, by which the donor can revoke the authority of the agent, and resume possession of the property, at any time before the authority is executed. On the other hand, if the donor delivers the property to the third person, with the intent that the gift shall take effect immediately, and thus parts with all present and future dominion over it, the third person holds as trustee for the donee, and the gift is in that respect complete.

### McWILLIE v. VAN VACTER.

35 Miss. 428. 1858.

SMITH, C.J., delivered the following opinion:—

The adverse title set up, and upon which the assumption is based, that the property in question was not assets of the estate, and therefore not subject to distribution, arises under the deed of gift

referred to in the defendant's answer. That deed purports to be founded upon the love and affection, which the donor or grantor bore to the donee, Mrs. Sarah J. McWillie, her daughter-in-law, and the further consideration of one dollar. It conveyed certain slaves, including those in controversy, to Mrs. Sarah J. McWillie, for life, with remainder to a trustee, for the use of the appellant, Abram A. McWillie, and reserving to the grantor during her life the possession and control of the property. It bears date on the 25th of April, 1842, and was, on the same day, acknowledged before a justice of the peace, whose certificate is in the following words: "Personally appeared before me, Daniel Moore, an acting Justice of the Peace in and for said county, Mrs. Ann McWillie, widow, trading and acting for herself, who, in my presence, signed, sealed, and delivered the foregoing instrument of writing as her own act and deed, and for the purposes therein specified." The grantor died on the 5th of October, 1844, and the deed was filed for record two days after that event. The record contains no further proof of the delivery of the deed. Abram A. McWillie lived on the same place with the grantor, when the deed was executed, and when she died. There was no evidence, nor an attempt at proof, that the slaves specified in the deed were ever delivered to any person interested under it. On the contrary, in accordance with the reservation in the deed, the evidence tends strongly to show that, in point of fact, there never was a delivery of the property embraced therein.

The questions arising upon these facts respect the validity, due execution, and delivery, of the instrument under which the adverse claim of Mrs. Sarah J. McWillie and the appellant is set up. We will first direct our attention to the character of the instrument itself, as our conclusions upon that subject may dispense with any further investigation.

We entertain no doubt that the instrument in question is to be regarded as a voluntary deed, and not a conveyance of property, based upon a consideration deemed valuable in law. It is what the law recognizes as a deed of gift. The proposition to be solved, therefore, is whether a gift or a donation of chattels personal, without delivery of possession to the donee, by deed of gift which reserves possession to the donor for life, is valid, under the law of this State?

A gift of a chattel personal is the act of transferring the right and possession thereto; whereby one man renounces, and another man acquires, immediately, all right and title thereto. No consideration is necessary to support it; and if made *bona fide*, and there is an immediate delivery of possession, it is good against the world. But if the gift does not take effect by immediate delivery of possession, it is then not a gift, but a contract. The subject of the gift must be certain, and there must be the mutual consent and concurrent will of both parties. Delivery of possession to the donee was essential to

the validity of a gift of a chattel personal. This was, unquestionably, the rule at common law, in regard to gifts by parol. But a distinction has been taken, in some of the English cases, between gifts by parol and by deed; and it has been hinted or assumed, that a gift of a chattel might do, without delivery, if made by deed, or in writing. *Flower's Case*, Noye's Rep. 67 (cited by Kent); *Irons v. Smallpiece*, 2 Barn. & Alder. 551. This rule, as a principle of the common law, at best, rests upon slender authority, and by Chancellor Kent is denied to exist. 2 Kent's Comm. 439. However this may be, no doubt can be entertained as to the doctrine of this court on the subject for the last twenty years; as no distinction has ever been recognized between the gift of a chattel personal, by parol or by deed. In all cases, in which the question has come directly before the court, and where its determination was necessary to a disposition of the case, it is held, that delivery of possession is essential to the validity of a gift, whether attempted to be made by parol, or by an instrument in writing. *Marshall v. Fulgham*, 4 How. 216; 2 Ib. 745 (*Thompson v. Thompson*); *Caradine v. Collins*, 7 S. & M. 428; *Newell v. Newell*, 34 Miss. R. 385; *Haley v. Brown* (not reported).

In the two first cases, the question arose upon deeds which purported to convey the property donated, absolutely, without any condition or reservation of possession to the donors. In the third case, the words, "under my own proper guardianship and protection," were inserted after the *habendum* in the deed of gift, which, it is manifest, was equivalent to a reservation of the possession, until the donor should see proper to perfect the gift, by a delivery of the property specified in the deed. The charges given in the court below, raised, directly, the question whether the deed was operative, or not, unless there had been a delivery; and it was distinctly held, and stated to be the settled doctrine of this court, that a delivery, either actual or constructive, was essential to the validity of a gift; and of course, whether the gift was by parol, or an instrument of writing; as the question then under consideration arose upon a deed duly executed and recorded. The court say, in that case, "As between the donor and donee, the gift of a chattel is incomplete, without delivery, or some act equivalent to a delivery, if at the time the thing be susceptible of transmission. We do not say, that actual delivery is necessary; it may be constructive, or symbolical. Perhaps the delivery of a deed, or having it recorded, might be regarded as circumstances sufficient to amount to a delivery, or to justify the presumption that a delivery had been made. We only decide, that delivery, actual or constructive, is necessary."

The fourth case, *Haley v. Brown*, presented the precise question under consideration. In that case, there was no written opinion; but it was decided expressly upon the authority of the case previously

cited. The case of *Newell v. Newell* recognizes the doctrine held in all the preceding cases; that is, that "a gift is never complete without a delivery of the property."

It has been supposed, that the Statute of Frauds (H. Code, 637, sec. 2) has an important bearing upon the subject. The expressed and manifest object of that statute was to protect creditors and purchasers, without notice, against fraudulent sales and voluntary gifts. For this purpose, the statute requires that possession shall *remain* with the donee, or a deed be duly executed and recorded, as notice to the world that the gift was made. It is clear, that the statute does not attempt to change the rule at common law, which makes delivery to the donee essential to the validity of a gift of a chattel personal. It proceeds upon the presumption, that a valid gift has been made; and provides that the gift, however valid, shall not stand against creditors and purchasers, unless possession shall *remain* with the donee, or the gift be evidenced by deed duly executed and recorded. It is, hence, manifest that the statute has no application to the subject.

As delivery is the act by which the donor parts with his title and possession to the subject of a donation, and the donee acquires the right and possession thereto, it seems too plain for controversy, that if a deed of gift which purports to transfer the possession and title to a chattel, to take effect *in presenti*, be inoperative, unless delivery be made to the donee; a deed of gift of chattels, which purports to convey a present interest, to take effect, in possession, upon some future event, where possession is not delivered, but is expressly reserved to the donor, must also be invalid.

As this is incontrovertibly true, in order to avoid a very palpable inconsistency, we would be driven to hold that the gift, in either case, is void without delivery of possession, or that a delivery is not necessary to the validity of a gift of a chattel personal. But if we adopt the latter alternative, we disregard a plain principle of the common law, and discard a doctrine of this court, which has been acted upon, by citizens, clients, and counsel, for near a quarter of a century, as the settled law of the land.

HANDY, J., delivered the following opinion:—

The question is, is a deed of gift, signed, sealed, and delivered by the donor to the donee, conveying personal chattels to the donee, but reserving possession to the donor for a specified time, valid, as between the donor and donee, to transfer to the latter the title to the property?

It is true, that the negative of this proposition is held by the cases of *Thompson v. Thompson*, 2 How. 737, and *Marshall v. Fulgham*, 4 Ib. 216. In the former of these cases, it is to be observed, the instrument under which the title was claimed, was not in law a deed, and could not import any of the legal efficacy of a deed. The ques-

tion, therefore, did not properly arise in that case, and it cannot be considered as authority upon the point.

In *Marshall v. Fulgham*, there was no reservation of possession to the donor, in the deed; but it is broadly held, that if a deed does not take effect by immediate delivery of possession of the chattel, it is not a gift, but a contract.

The authority on which this rule is stated, is 2 Bl. Comm. 442. But it appears to be evident, from the context, that Blackstone referred to *gifts by parol*, in the passage cited, and when he says that *a true and proper gift* is always accompanied by delivery of the chattel; for he states, as a reason for it, that then "it is not in the donor's power to retract it." He further states, that without delivery, it is not a gift, but a contract. Yet he shows in the same chapter, that *if it be by deed*, though voluntary, it imports a consideration, and the donor is bound by it. So that the general remark, in relation to the necessity for delivery of possession, must have been made with reference to what he denominates "*a true and proper gift*" — a naked, simple gift — by parol; for he lays it down, as the general rule, that gifts of chattels may be made, "either in writing, or by word of mouth, attested by sufficient evidence, *of which delivery of possession is the strongest and most essential.*" It is, therefore, only in point of evidence of the fact that the gift has been made, that delivery of possession is essential. But it does not follow, that that fact may not be shown by other evidence than delivery of possession.

He says but little, as to gifts by writing or deed, because such instruments are such clear evidence of the title conveyed by them, that they would speak for themselves, and required nothing to be said, as to their nature and effect, which were governed by the general rules applicable to deeds. But it was different with respect to parol gifts. Being doubtful and uncertain as to their true character, and as to the evidence upon which they rested, it was necessary that some decisive act, showing clearly that the donor intended that the chattel should be the property of the donee, should appear; and that act, in such a case, was the delivery of possession. But, in the case of a conveyance by deed, the nature of the title is rendered certain to the donee, and the donor is thereby estopped from setting up title, contrary to the terms of his solemn deed. Hence the reasons stated by Blackstone, as rendering delivery necessary, in the case of a parol gift, could not be applicable to a gift by deed.

If, however, a gift by deed be regarded *as a contract*, as stated, it can make but little difference, as between the donor and donee, by what name the act is designated; for if it be a contract, it would bind the donor, and, in equity, the donee would take the use and possession of the chattel which the donor had contracted to convey, agreeably to the terms of the contract; and, as to creditors and

subsequent purchasers, the deed, if recorded, and made *bona fide*, is rendered valid, by the positive provisions of the Statute of Frauds.

But the rule, as stated in *Marshall v. Fulgham*, is not sustained by the subsequent cases in this court. In *Carradine v. Collins*, 7 S. & M., it is said: "As between donor and donee, the gift of a chattel is incomplete, without delivery, or *some act equivalent to delivery*." "The delivery may be *constructive*, or symbolical. Perhaps the delivery of a deed, or having it recorded, might be regarded as circumstances sufficient to amount to delivery, or to justify the presumption that delivery had been made. We do not decide what is a sufficient delivery, or what is sufficient evidence that it was made. We only decide that delivery, actual or constructive, is necessary." And this doctrine is sustained, by reference to the cases in 12 John. 188, and 10 Ib. 293.

It is worthy of remark, that the case cited in 12 John. Rep. was a title set up *under a parol gift* of a slave; and, with reference to such a gift, that court says, that "a delivery of possession was necessary to a change of property"; and the case in 10 John. Rep. was a *parol gift* of a *chose in action*; and the court says, that, in such a case, "delivery of possession is necessary to constitute a valid gift." But nothing is said, nor, indeed, could properly have been said, in either of these cases, as to the validity of a gift by deed, without delivery of possession of the chattel to the donee.

It would appear, from this case of *Carradine v. Collins*, that it was not considered to be necessary that there should be an actual delivery of the chattel, in order to render the gift valid, when it was made by deed, duly signed, sealed, and delivered; and this doctrine is amply sustained by authority and by sound reason.

It is said that the case of *Wall v. Wall*, 30 Miss. 91, is not an authority upon the point, because the question was not there presented, and was not necessary for the decision of that case. This is a misapprehension. The question was, whether the instrument, in that case, was a will or a deed. That was the question argued by counsel, and decided by the court. In order to determine whether it was a deed, the question was distinctly presented, whether the disposition of the property, made by it, was valid in law, or void. And that involved two questions, — whether the instrument was delivered; and whether it was valid, the possession of the property being reserved to the donor for life. It was, thereupon, determined, that the disposition was legal, and hence that it was a valid deed, and not a will; so that the character and legal effect of the instrument were distinctly presented.

The distinction as to the necessity for delivery is clearly laid down in the elementary works. "A gift," says Chitty, "is not good and binding, unless it be by deed; or unless the thing, which forms the subject of the gift, be actually delivered to the donee." Chitty

Contr. 52. The same rule is laid down in Williams on Personal Property, 33. It is also held by adjudications in England, as a rule of the common law: *Irons v. Smallpiece*, 2 Barn. & Ald. (4 Eng. C. L. Rep.) 552; *Ward v. Audland*, 16 M. & W. 871; and is fully sanctioned by adjudicated cases in this country: *Banks v. Marberry*, 3 Littell, 276; *Bohn v. Headley*, 7 Harr. & John. 257; *Caines v. Marley*, 2 Yerger, 582; *Duncan v. Self's administrator*, 1 Marp. (N.C.) 466. And no adjudicated case has been produced, holding that a gift by deed, duly executed and delivered, without delivery of possession of the chattel conveyed, was not valid, by the rules of the common law, except it be *Marshall v. Fulham*.

These authorities appear to be conclusive of the question, as a rule of the common law.

But the validity of such a gift is clearly recognized by our Statute of Frauds. Hutch. Code, 638, § 2. It enacts, that any conveyance of chattels, not upon valuable consideration, shall be taken to be fraudulent, as to creditors and subsequent purchasers, *unless the same be by deed*, acknowledged and recorded, or unless the possession of the chattel should remain with the donee. This statute, it is true, has especial reference to creditors and subsequent purchasers; but it distinctly recognizes the validity of a gift of chattels, *as to such persons*, provided it be made *bona fide*, and duly acknowledged and recorded. And would it not be absurd to hold such a deed valid, as to the rights of creditors and subsequent purchasers, but yet void as to the parties themselves? It would be impossible to hold that such a deed was valid as to third persons, as it is clearly declared by the statute to be, and yet inoperative as between the parties to it; for that would be contrary to all reason, as well as the rule plainly recognized by the statute, that the deed is binding between the parties to it, though void as to creditors and subsequent purchasers; and though, in order to make it effectual, as to such persons, it must be recorded, yet, as between the parties, no registration is necessary, provided it be a deed duly executed and delivered.

The Statute of Frauds has indicated, in how far conveyances of the character in question were deemed impolitic and not to be countenanced. But, as between the donor and donee, irrespective of the claims of creditors and subsequent purchasers, no reason of sound policy appears to require that a donor shall not have the power, by deed duly executed and delivered, and especially if recorded, to convey his chattel by way of gift, to a person standing in such a relation of blood or kindred to him, as to constitute a good consideration, to take effect in possession at a specified time. Such settlements appear to be just and convenient as a mode of disposition of property, enabling the donor to dispose of his property deliberately, while in the enjoyment of his faculties, carefully fixing the terms upon which it should vest in possession in the donee, saving the

trouble and expense of administration and distribution, and making an open declaration of the act; and, at the same time, assuring and making known to the object of his bounty, the portion of the donor's property which he was to receive, without the power of revocation. It is easy to perceive that, in such dispositions of property, nothing but justice would be done to those who should be the beneficiaries of the donor's property, by securing it to their use beyond the power of revocation, but to take effect in possession at the time which the donor had seen fit to appoint.

Nor does this rule disturb any rights which may have been acquired by a conformity to the rule in *Marshall v. Fulgham*. That decision is but the negation of a power. No practice can have grown up under it in the country, and no instruments could have been made with reference to it, the operation of which would be affected by the view of the question here taken. But, on the contrary, the cases are numerous in the country where this rule has been acted upon, and where deeds of gift have been made in good faith, and duly delivered and recorded, and treated by the parties as valid, reserving possession of chattels to the donor for a specified time. In all such cases, the honest intentions, and, it may be, just dispositions of property, of the donor, would be defeated under the rule contended for, and with the most unjust consequences.

Under these views of the subject, I am of opinion that the deed in this case, if it had been duly executed and delivered, would have been valid, as between the donor and donee, to convey the slaves to the donee, to take effect in possession at the donor's death.

NOTE. — The opinion of Handy, J., that a deed of a chattel passes title thereto upon delivery of the deed alone is supported by the weight of authority. See *Connor v. Trawick's Adm'r*, 37 Ala. 289, 294; *Wyche v. Greene*, 11 Ga. 159, 177; *Tarbox v. Grant*, 56 N. J. Eq. 199, 205; *Harten v. Gibson*, 4 Desauss. (S.C.) 139; *Caines v. Marley*, 2 Yerg. (Tenn.) 582; *Hillebrant v. Brewer*, 6 Tex. 45, 51; *Carr v. Burdiss*, 1 Crompt. M. & R. 782, 788.

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### BUTLER AND BAKER'S CASE.

3 Coke, 25 a. 1591.

THE same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by that the property and interest will be divested, and such disagreement need not to be in a court of record.



NOTE. — Approved in *Standing v. Bowring*, L. R. 31 Ch. D. 282.

The question whether acceptance of a gift of chattels is necessary to vest title in the donee and the question whether acceptance of a deed of real estate is necessary to vest title in the grantee raise the same considerations. The second question has been before the courts much oftener than the first.

The authorities are tending to the conclusion that, where the deed is beneficial in its character, title vests in the grantee upon delivery of the deed, without more, subject to divestment upon actual dissent by the grantee. There is, however, important authority to the contrary, requiring actual assent by the grantee, — at least, if the grantee is not, by reason of infancy or lunacy, incapable of actual assent.

On the question whether acceptance of a gift of chattels is necessary to vest title in the donee, see *Bangs v. Browne*, 149 Mich. 478; *Beaver v. Beaver*, 117 N.Y. 421, 429; *Davis v. Garrett*, 91 Tenn. 147, 152; *Mahoney v. Martin*, 72 Kan. 406, 410. In *Bangs v. Browne*, title to a bank deposit was held to have vested in the donee, although the donee had no knowledge of the gift until after the donor's death. In *Beaver v. Beaver* the court said: "The acceptance, also, may be implied where the gift, otherwise complete, is beneficial to the donee." In *Davis v. Garrett*, the court held that "when the donee is incapable of exercising any discretion in the matter, and the conveyance is clearly beneficial, the law will presume an acceptance." But in *Mahoney v. Martin*, the court said: "No gift can be complete without the acceptance thereof by the donee. The law presumes such acceptance in the absence of evidence to the contrary. When this fact is disputed its determination will depend, like any other question of fact, upon the evidence. . . . The court found from the evidence that the donee did not accept the gift during the life of the donor."

## CHAPTER VIII.

## DISTINCTION BETWEEN A SALE AND A BAILMENT.

## NORTON v. WOODRUFF.

2 N.Y. 153. 1849.

APPEAL from the supreme court, where the action was assumpsit brought by Norton, Baker and Hall against Woodruff, tried at the Onondaga circuit, before Whiting, circuit judge, in April, 1846. The plaintiffs claimed to recover upon a contract in the words following, viz:

"I agree to take all the wheat that Norton, Baker and Hall have at the storehouse of S. H. Cook, in Camillus, and also all the wheat they have at the storehouse of E. Shead, in Belleisle, and give them one barrel of first-rate superfine flour at my mill in Salina, for every four and 36-60th bushels of wheat. I am to take the wheat at the storehouses, and pack the flour in first-rate barrels, and warrant the flour to pass inspection in Albany or New York market for good superfine flour, one half of the flour to be delivered on Friday of next week, and the balance on Friday of the week after, and as much sooner as I can make it. The wheat is to be of good merchantable quality.

J. C. WOODRUFF.

"Salina, Oct. 2, 1845.

NORTON, BAKER AND HALL."

It was proved that the quantities of wheat mentioned in the above contract amounted to 3848 bushels, all of which was received into the defendant's mill, in pursuance of the contract, on the 6th and 8th days of October, 1845; that the defendant had on hand at the time about 4000 bushels of other wheat of about the same quality as that received from the plaintiffs, and that on receiving the wheat in question the whole was mixed together. It also appeared that the wheat would make about one barrel of superfine flour to four and 15-60ths bushels of wheat; that the defendant's mill would grind about 100 barrels of flour per day besides ordinary custom work; that the defendant was in the habit of taking in wheat almost daily, none of which was kept separate; and that he supplied persons with whom he dealt with flour made from the common mass of wheat, including that received from the plaintiffs. On the 10th day of October, 1845, the defendant delivered to the plaintiffs 420 barrels of flour upon the aforesaid contract, and no more was ever delivered.

On the part of the defendant it was proved that on the night of the 12th of October, 1845, the mill accidentally took fire and was consumed, with all its contents, without any fault or negligence of the defendant. There was then in the mill about 4000 bushels of wheat, including nearly 2000 bushels of the wheat received from the plaintiffs, and about 150 barrels of flour packed.

The defendant insisted that the contract was one of bailment, and not of sale, and therefore that by the destruction of his mill and its contents without fault on his part, he was excused from delivering the residue of the flour. The circuit judge so held, and on that ground nonsuited the plaintiffs. The plaintiffs excepted, and moved in the supreme court for a new trial, which was granted by that court sitting in the Seventh District. The defendant appealed to this court.

GARDINER, J., delivered the opinion of the court.

The only question necessary to be considered is, whether the terms of the contract taken in reference to the subject-matter and the situation of the parties, fairly import a sale or a bailment.

Neither the declarations nor the conduct of the defendant subsequent to the agreement, were admissible with a view to its construction. Evidence of this character may be resorted to for the purpose of proving a contract, or the sense in which particular terms were used by the parties, and sometimes with a view to show a conversion of the property where a bailment has been previously established. Here, however, the contract is in writing. There is no such ambiguity in the terms as requires the aid of extrinsic testimony to explain them, and the rights of the parties must consequently be determined by its language.

It appears, then, by the contract, that the defendant agreed to take all the wheat of the plaintiffs at, etc., and give them one barrel of first-rate superfine flour for every four bushels and fifty-six pounds of wheat of a good merchantable quality; the flour to be packed in first-rate barrels and warranted to pass inspection in Albany and New York for good superfine flour. If the word "take" as it seems in this contract is equally applicable to a bailment as to a sale or exchange, and therefore equivocal, the term "give" requires some act of the defendant which should pass the property in the flour to the plaintiffs. As a word of contract, it demands something more than the re-delivery of the plaintiffs' wheat in the form of flour. It implies that the property in the thing to be given is in the donor until changed by delivery. The word does not import a mere gratuity, since the defendant was to "give" superfine flour "for," that is, in consideration of, or as an equivalent for, the wheat taken by him from the plaintiffs.

There is nothing in the contract that expressly or by implication

obliged the defendant to deliver to the plaintiffs flour manufactured from this wheat, or wheat of a similar quality, to the exclusion of any other in their possession, or which they might subsequently obtain. The agreement upon his part was satisfied by the delivery of a barrel of first-rate superfine flour for every four bushels and fifty-six pounds of wheat received by him, whether manufactured at his mill or elsewhere, obtained by purchase or otherwise. This is a controlling circumstance to show that the parties intended a sale or exchange and not a bailment. The distinction between an obligation to restore the specific thing received, or of returning others of equal value, is the distinction between a bailment and a debt, so recognized by the decisions in England and this state, with the exception of *Seymour v. Brown*, 10 John. Rep. 44. Jones on Bailment, 102, 64; 7 Cowen Rep. 756; *Smith v. Clarke*, 21 Wend, 84; *Dykers v. Allen*, 7 Hill, 498; 2 Kent, Com. 590. The decision in *Seymour v. Brown* has been overruled in the same court in which it was pronounced, and cannot, we think, be sustained either upon principle or authority. A new trial must be granted.

*New trial granted.*

#### SOUTH AUSTRALIAN INSURANCE CO. v. RANDELL.

L. R. 3 P. C. 101. 1869.

THIS was an action on a fire policy of insurance, in which the respondents were plaintiffs, and the appellants were defendants.

The appellants were an insurance company, carrying on business in the province of South Australia, and having their principal place of business at Adelaide, in that province. The respondents were millers, carrying on business at Blumberg, in the same province.

The facts were these:—

On the 4th of July, 1866, application was made to the appellants by the respondents, to insure the current stock in their mill, namely, wheat, flour, sacks, etc., to the amount of £1250, against loss or damage by fire, and on the same day an insurance was effected in the terms of such application, and subject to the conditions indorsed on the policy; one of which was that "Goods held in trust or on commission must be insured as such, otherwise the policy will not extend to cover them."

On the 17th of February, 1867, a fire occurred, whereby the respondents' mill, with the stock therein, was destroyed. A claim was made by the respondents for the loss, but the amount being disputed by the appellants, an action was brought by them to recover the value of the stock.

The plaintiffs declared upon the policy, and the defendants pleaded, that the plaintiffs were not interested in the stock, and also

that in their proposals for the insurance they represented that the stock was to be insured for themselves, whereas it was held by the plaintiffs in trust for other persons. Issue was joined on the pleas, and the action was tried before the chief justice and a jury.

Upon the trial it was admitted by the plaintiffs, that the stock which had been destroyed by the fire had been paid for by the defendants, except such portion as the defendants alleged was held by the plaintiffs in trust for others; and the question was, whether such portion, consisting of wheat, was held by the plaintiffs in trust, within the meaning of the above condition, and was therefore not covered by the policy.

The evidence, so far as it was material to this question, shewed that according to the plaintiffs' custom and course of business wheat was received by them from farmers to whom such course of business and dealing was known, and on receipt, shot out of bags in the presence of the farmers who brought it into large hutches, where it became mixed with other wheat which had been received in a similar manner, and on part of which advances had been made to the farmers by the plaintiffs. The wheat thus mixed lost its identity and became the current stock of the plaintiffs, which, according to their course of dealing, known to the farmers, was either sold as wheat by the plaintiffs or ground in their mill. The plaintiffs could do what they liked with it. If ground, the flour produced from such stock was sold and otherwise dealt with by the plaintiffs as they thought fit, and as their own property. It never was intended by the parties that the identical wheat delivered by the farmers should be returned to them. On delivery of the wheat to the plaintiffs they gave to the farmer a receipt in these terms, "Received, etc., to store," and it was shot to be stored or taken on storage. The farmer could at any time demand an equal quantity of wheat of like quality with that delivered by him to the plaintiffs, or the market price of an equal quantity, fixing the price as of the day on which he made his demand. The plaintiffs had the option of delivering wheat of like quality or paying such market price. Advances were frequently made to the farmers by the plaintiffs in respect of the wheat so delivered to them. No charge was made by the plaintiffs in respect of the wheat until after the lapse of a certain time, when the charge was one farthing per bushel per month. The wheat in question had been brought by farmers to the plaintiffs in manner aforesaid, and in the course of business, and had been mixed with other wheat, and treated in the manner aforesaid, and a portion of it had been paid for by the plaintiffs. No evidence was adduced on the part of the defendants, but their counsel applied for a nonsuit on the ground that the wheat was held in trust, and was not the property of the plaintiffs.

The chief justice declined to nonsuit the plaintiffs, and by consent

the verdict was entered for them for £698, including interest, with leave to the defendants to move to enter a verdict for them if the court should be of opinion, that the wheat so taken on storage was held in trust within the terms of the conditions in the policy.

A rule *nisi* was granted calling on the plaintiffs to shew cause why the verdict for the plaintiffs should not be set aside and a verdict entered for the defendants, pursuant to leave reserved, upon the following grounds: First, that the goods stored had not been assured by the plaintiffs; and secondly, that the wheat taken on storage was held upon trust within the terms of the conditions of the policy.

This rule came on to be argued before the chief justice and Mr. Justice GWYNNE, when the court was divided in opinion, Mr. Justice GWYNNE being of opinion, that the property in the wheat when delivered was vested in the plaintiffs beneficially, as their own property, and was not property held in trust; the chief justice being of the contrary opinion, and Mr. Justice WEARING being precluded from taking part in the judgment, the rule was discharged.

From this judgment the present appeal was brought.

Their Lordships' judgment was pronounced by SIR JOSEPH NAPIER:—

The question in this case is, whether the wheat that was taken in storage by the respondents, under the circumstances stated in the chief justice's notes of the evidence at the trial before him, is to be considered as property held by the respondents in trust, or whether it is correctly described in the proposal and in the policy of insurance as property in which the respondents were interested for themselves? According to the case that was cited by Mr. Thesiger in his very able argument, the words of the policy as to property held in trust ought not to receive a technical chancery construction (if I may so call it); but the substantial question is, whether the respondents were the beneficial owners of the wheat insured, or had merely the possession as bailees, whilst the property remained in the farmers who delivered the wheat, so long at least as it was not actually appropriated by use or payment on the part of the respondents?

Looking to the evidence, in order to ascertain the conditions upon which this wheat was delivered and taken in storage, we find in the evidence of Randell (one of the plaintiffs) the following passage: "At the time of the fire the whole of the wheat, excepting a few bags — not more than twenty — was in bulk. It had been shot out of bags into large hutches. Have been a miller twelve years. The wheat was ours to do what we thought proper. We might grind or sell; and when any one came who had brought us wheat, we had to pay market price of equal quality." Again, the foreman of the plaintiffs, in his evidence, says: "Farmer brings the wheat, and he can

sell it when he pleases to the miller. Miller can do what he likes with it, grind it or sell it. All wheat when brought was emptied at once into a storing-place in presence of farmer who brought it."

The evidence of the only farmer who was examined does not throw any light upon the question, but rather obscures it. The substance and effect of all the evidence that bears on this part of the case is this. When wheat was brought by the farmer to the miller, he delivered it to the miller to be stored with his current stock that was used for the known purposes of his trade. It was, with the consent of the farmer, put into storage with this consumable stock of the miller; the farmer got a storage receipt for it, and might afterwards come at any time he thought fit to claim the price of the same quantity of wheat of equal quality according to the market price of the day on which he claimed payment.

The evidence is somewhat confused and inconsistent on the surface in one or two places, but it sufficiently appears that the farmer had the right to select his time for demanding payment for the wheat, which, with his consent, was stored at the time of delivery, as part of the current consumable stock which the miller might grind or sell or use at his will and pleasure for his own profit.

There is no direct evidence that the farmer had the option of claiming an equal quantity of wheat of the like quality, instead of the value in money; and from the very nature of the dealing he could not get back the identical wheat delivered, as it was mixed in the common stock with his consent.

A bailment on trust implies that there is reserved to the bailor the right to claim a redelivery of the property deposited in bailment. No doubt the cases that are referred to are generally cases of a bailment without a question of mixture. Mr. Theaiger in his argument put it as if there was some distinction in the case, in favour of the appellants, on account of the mixture; but the facts as they appear on the evidence exclude the applicability of such a distinction. Taking the view of it most favourable to his argument, that the farmer could claim as of right an equal quantity of the like quality, this must be without reference to any specific bulk from which it should be taken, for the stock with which he consented to allow his wheat to be mixed might all have been used for the benefit of the miller before the claim of the farmer would be put forward.

The law seems to be concisely and accurately stated by Sir William Jones in the passages cited by Mr. Mellish from his treatise on Bailments, pp. 64 and 102 [3d ed.]. Wherever there is a delivery of property on a contract for an equivalent in money or some other valuable commodity, and not for the return of his identical subject-matter in its original or an altered form, this is a transfer of property for value — it is a sale and not a bailment.

Chancellor Kent in his Commentaries (vol. ii, § 589, p. 781,

11th ed.), where he refers to the case of *Seymour v. Brown*, of which he disapproves in common with Mr. Justice STONY, adopts the test, whether the identical subject-matter was to be restored either as it stood or in an altered form; or whether a different thing was to be given for it as an equivalent; for in the latter case it was a sale, and not a bailment. This is the true and settled doctrine according to his opinion. Now, the farmers do not appear on the evidence to have contracted for more than to be paid for an equal quantity of the like quality of wheat, delivered at the market price of the day on which a settlement should be demanded. Supposing that there was an implied option to claim an equal quantity of the like quality at any time after delivery, there could be no right of claiming an aliquot part of the identical bulk with which his wheat was mixed up at the time of delivery, for this was consumable at the will and pleasure of the miller, as part of the current stock, liable to fluctuation, from time to time, both in quantity and quality.

Moreover, it appears to their Lordships, that there is no sound distinction, in principle, between this and the case of money deposited with a banker on a deposit receipt. It may have been deposited in negotiable paper, in bank-notes, or in sovereigns, but it is paid in upon the known course and conditions of the banker's dealings. A man is supposed to intend the natural consequence of his acts. He knows the course of dealing; he hands in the money; he gets a deposit receipt; he knows that the money is taken by the banker to be dealt with as part of his current capital, to be used as his own for his own purposes. By the deposit, it is placed in the disposing power of the banker; and surely he who has acquired the disposing power over property for his own benefit, without the control of another, has the beneficial ownership.

In the banker's case in the House of Lords, the case of *Foley v. Hill*, 2 H. L. C. 28, the question was fully discussed, whether a banker, under such circumstances, could be considered and dealt with as a trustee; Lord COTTENHAM says (at page 36): "Money, when paid into a bank, ceases altogether to be the money of the principal (see *Parker v. Marchant*, 2 Phillips, 360); it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him, when he is asked for it. The money paid into the bankers is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is



guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound to keep it, or deal with it as the property of his principal, but he is, of course, answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands."

An indelible incident of trust property is that a trustee can never make use of it for his own benefit. An incident of property, that is in bailment, is that the bailor may require its restoration. This right of recalling the deposit is relied on by Lord COTTENHAM (p. 39), as a test to try the principle on which the fiduciary relation was sought to be maintained. But in this case, no right seems to exist on the part of the depositor to get back either his identical wheat, or a share of the specific bulk in which his wheat was mixed with his consent; there is no such right on the one side, while, on the other, there is the power in the miller of doing what he liked with the wheat after it became part of his current stock. This is an inverted order of right that is wholly inconsistent with the relation of trustee and *cestui que trust* that is contended for in this case.

Lord BROUGHAM, in the case already cited, says (p. 43): "Now, as to the banker: is his position with respect to his customers that of a trustee with respect to his *cestui que trust*? Is it that of a principal with respect to an agent, or that of a principal with respect to a factor? I see no ground for contending that there is any identity in those two points. I am now speaking of the common position of a banker, which consists of the common case of receiving money from his customer on condition of paying it back when asked for, or when drawn upon; or of receiving money from other parties, to the credit of the customer, upon like conditions to be drawn out by the customer, or, in common parlance, the money being repaid when asked for, because the party who receives the money has the use of it as his own, and in the using of which his trade consists, and but for which no banker could exist, especially a banker who pays interest. But even a banker who does not pay interest could not possibly carry on his trade if he were to hold the money and to pay it back, as a mere depositary of the principal. But he receives it, to the knowledge of his customer, for the express purpose of using it as his own, which, if he were a trustee, he could not do without a breach of trust."

As to the charge for storage, it is to be observed, that it is not the storage of the wheat that was actually delivered, or of an equal quantity of the specific stock with which it was mixed up at the time of delivery, but storage for an equal quantity which is assumed to have been kept in the current stock of the mill. It seems to be an equitable term of the final settlement, in which the farmer has the benefit of selecting the time that is most advantageous for him-

self to claim payment at the market price of the day for the same quantity of like quality of wheat that he delivered.

The charge or deduction for storage of so much in quantity as was delivered may be set off against the farmer's privilege of selecting his own time for payment at the market rate of the day. This is the more reasonable if there was an option on the part of the miller to give the farmer a like quantity of a like quality, because he might then be supposed to have kept a quantity in storage for the purpose of having it in his power to exercise this option; or if the farmer had a corresponding option of claiming an equal quantity of like quality, instead of the money value. But, however this may be, it does not vary the general nature of the case any more than where deposits are made with a banker for a given time, and he allows a small rate of interest on the money.

Putting the insurance out of view, let us see on whom would the loss fall of the stored wheat destroyed by this fire. Would it be any answer for the miller to say to the farmer when he came to claim the price of the wheat according to contract: "All this wheat has been destroyed by a fire"? The farmer might well reply: "It was delivered to you, and at once put into your current stock, to be used as you thought fit for your own use and benefit. You acquired complete dominion over it, and you must, therefore, bear the loss." It is not upon the exercise of a dominion not subject to control, but upon having such dominion, that beneficial ownership depends. The party who has acquired such dominion over property is not bound to exercise it in any particular way or at any particular time, but the having the power to use property as his own for his own purposes is wholly irreconcilable with the notion of his being a trustee of the property, holding it for the benefit of his *cestui que trust*.

There is a passage in "Doctor and Student" "Dial," by Murchall [ed. 1815], to which reference may here be made. It is in the second dialogue, ch. xxxviii: "A man may have of another by way of loan or borrowing money, corn, wine, and such other things, where the same thing cannot be delivered if it be occupied, but another thing of like nature and like value must be delivered for it; and such things he that they be lent to, may, by force of the loan, use as his own; and, therefore, if they perish, it is at his jeopardy." Here, by force of the contract, the miller might use as his own the whole of the wheat that was delivered to him by the farmers. Accordingly, the miller would be responsible to the farmers, notwithstanding the loss of the wheat by the fire, *Res suo perit domino*.

If, then, the property was so vested in the respondents that they must bear the loss by the fire, if not indemnified by insurance, is not this the very case in which, on effecting an insurance, a man ought to describe the property substantially and honestly as being insured for himself and not held in trust for the benefit of another?

Although afterwards there may have been some inexactness and inconsistency in the language of Mr. Randell, when trying to get a settlement and meeting objections that were raised by the appellants (and we all know that such is not unusual in disputed cases), this cannot alter the legal result of the whole transaction. It depends upon ascertained facts, and we are bound here to read the report of the evidence as reasonable men with the eyes of common sense, and to make every just inference which the statement of the evidence fairly warrants.

Their Lordships do not find anything in the judge's notes that is not reconcilable with the plaintiffs' statement of the result of the dealings. "The wheat was ours to do what we thought proper. We might grind or sell; and when any one came who brought us wheat, we had to pay market price of equal quality." The result is, in the opinion of their Lordships, that the farmers who delivered their wheat to the respondents upon the terms disclosed in the evidence should not be considered afterwards to be the beneficial owners and the respondents' bailees in trust for the farmers.

It appears to their Lordships, that this is not the case of a possession given subject to a trust, but that it is the case of a property transferred for value, at the time of delivery, upon special terms of settlement.

What Chancellor Kent (§ 589, p. 781, 11th ed.) describes as "the true and settled doctrine," which had been disturbed by the case of *Seymour v. Brown*, 19 Johns. (Amr.) Rep. 44, but has been resettled by subsequent decisions, is the doctrine which is laid down with his known precision by Sir William Jones. It comes to this, that where goods are delivered upon a contract for a valuable consideration, whether in money or money's worth, then the property passes. It is a sale and not a bailment. In the case of mixture by consent, the identity of the specific property of each who consents is no longer ascertainable, and the mixed property belongs to all in common. It may perhaps be regarded, under special circumstances, as the case of persons having a common property, and if they all concur in a bailment of this property, all may require a redelivery of what they have so put in bailment. It may be that in such a case each might claim separately to have an aliquot part of the whole restored to him; but here the current stock was, from its very nature, liable to be changed from day to day, both in quantity and quality. The delivery was not for the peculiar or primary purpose of storage *simpliciter*, as in the case of a bailment of property to be returned to one bailor, or of any part to one or more of several joint bailors; but the wheat was delivered by each farmer independently, to be stored and used as part of the current stock or capital of the miller's trade. There seems to be no ground upon which a banker is held not to be a trustee, or a banker's current capital not to be trust

property, that is not applicable in principle to the case of the miller and his current stock of wheat, which is his trading capital.

Therefore, it appears to their Lordships, that the description in the proposal and in the policy is a correct and honest description of the subject of the insurance. As the question reserved at the trial was, whether the wheat taken in storage should be considered as trust property, within the terms of the conditions of the policy, and as their Lordships think that it should not be so considered, they will humbly advise Her Majesty that the order of the court below, discharging the rule *nisi* to set aside the verdict, ought to be affirmed and the appeal dismissed with costs.

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RICE v. NIXON.

97 Ind. 97. 1884.

ELLIOTT, C.J. — The appellee was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and it was also his custom to sell wheat from this bin, but of this custom the appellants had no knowledge. In August, 1882, the appellant Victoria Rice deposited with the appellee two hundred and ten bushels of wheat; this was thrown into the common bin in accordance with the custom of the appellee, and with it was mingled wheat bought by him and wheat stored by other depositors, and from this bin wheat was sold, from time to time, but there was always in the bin wheat enough to supply all depositors, and at any time before the destruction of the warehouse by an accidental fire the appellant could have received from the bin all the wheat she had deposited. Some time after the storage of the wheat the warehouse and all its contents were destroyed by fire, but the fire was not attributable to the wrong or negligence of the appellee. No demand was made for the wheat until after its destruction. The wheat was stored with the appellee, and there was no agreement that the bailor should have an option to demand the grain or its value in money.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury result to the owner from the act of the warehouseman in mingling them with like articles of his own. This doctrine is older, at least, than *Lupton v. White*, 15 Vesey Jr. 432, for there Lord ELDON said: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the

given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party can not tell what was the original value of his property, he must have the whole." Chancellor Kent takes a like view of the question, and his last editor, Judge HOLMES, cites a great many cases upon the subject. 2 Kent Com. (12th ed.) 365, 590. This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman. Story Bail., section 40; Law of Prod. Ex., section 152; 2 Schouler Pers. Prop., section 46; 6 Am. L. Rev. 457; 2 Blackstone Com., Cooley's ed., 404, *n*. There is, however, as shown by the cases cited, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common. Law of Prod. Ex., section 154, *auth. n.* 9.

To the authorities cited by the authors referred to may be added *Ledyard v. Hibbard*, 48 Mich. 421; *s. c.* 42 Am. R. 474; *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Graham*, 53 Iowa, 181; *Nelson v. Brown*, 53 Iowa, 555; *Irons v. Kentner*, 51 Iowa, 88; *s. c.* 33 Am. R. 119, where the rule is carried much farther than is necessary in the present instance. The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses, and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in entrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, leads to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place

for each depositor, then the fact that he puts it in a common receptacle with grain of his own and that of other depositors, does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights and liabilities of warehousemen are prescribed by the law as declared by the courts and the Legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, indeed, there is some stipulation in the contract imposing that character upon him.

The cases in our own reports, cited by counsel for the appellants, do not oppose the conclusion here reached. In *Pribble v. Kent*, 10 Ind. 325, the defendants received of the plaintiff one hundred and thirty-two bushels of grain, and on demand failed to deliver the wheat, and it was held that an action would lie, but the contract was held to be one of bailment, and not of sale. It is plain, therefore, that in the case cited there was no such ruling as that asked by the appellants in the present case; on the contrary, the ruling overturns their theory. In *Ewing v. French*, 1 Blackf. 353, and *Carlisle v. Wallace*, 12 Ind. 252, the wheat was delivered to a miller to be ground into flour, and this was held to be a sale, on the ground that the character of the article was to be entirely changed, and a new and different article was to be given by the miller to his customer in return for the wheat. In the last of the cases cited the option of demanding wheat, flour or money was vested in the depositor, so that he had the option of making the contract one of bailment or one of sale, and he exercised that option by treating the transaction as a sale. In the case under examination there was no option, for it is expressly found that the wheat was received by the warehouseman for storage. The case of *Ashby v. West*, 3 Ind. 170, holds that one who delivers wheat to be manufactured into flour is the owner of the flour, and may maintain replevin, the court saying: "We are clearly of the opinion that that contract is one of bailment, and not of sale," and this is against the contention of the appellants.

In deciding that the contract was one of bailment, and not of sale, we determine the only debatable question in the case, for it has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

We have examined the rulings on the demurrers to the answers and think they were correct; but if we were wrong in this there could be no reversal, because the special finding clearly shows the ground

on which the judgment rests, and from this it appears that if the rulings were erroneous the errors were harmless.

*Judgment affirmed.*

### SEXTON v. GRAHAM.

53 Iowa, 181. 1880.

ADAMS, CH. J. The first question to be determined is as to whether the transaction, in pursuance of which the receipts were issued to plaintiffs by Graham, was a sale by them to him. Of course, if the grain had been specially deposited, that is, with the agreement or understanding that it should be kept separate from all other grain, no question could have arisen. It would be conceded by the appellant that the transaction would have been a bailment and not a sale. But the receipt expressly provided that the grain might be stored with other grain of the same kind and grade, the conceded meaning of which is that the grain might be mixed with other grain of the same kind and grade in a common mass. Now, while the appellant contends that this is a most important fact, it does not contend that this fact alone would necessarily make the transaction a sale. Where a warehouseman merely receives grain from several depositors, with the understanding that it may be mixed in a common mass, and it is so mixed, the transaction is a bailment, and the depositors are tenants in common. *Cushing v. Breed*, 14 Allen, 380. But it is said that where the warehouseman is himself a depositor, and it is understood by the other depositors that their grain is to be mixed with his, with the right, on his part, to draw from the mass to the amount of his deposit, then the depositors do not become tenants in common, but the title to all the grain passes at once, upon deposit, to the warehouseman. In support of this view, the appellant cites *South Australian Ins. Co. v. Randall*, Law Rep., 3 Privy Council Appeals, 101; *Chase v. Washburne*, 1 Ohio St. 244; *Norton v. Woodruff*, 2 Coms. 155; *Carlisle v. Wallace*, 12 Ind. 252; *Smith v. Clarke*, 21 Wend. 84; *Hurd v. West*, 7 Cow. 752; *Lornegan v. Stewart*, 55 Ill. 45; *Wilson v. Cooper*, 10 Iowa, 565; *Johnston v. Browne*, 37 Iowa, 200. It is claimed by appellant, and we think the evidence so shows, that at the time of the transaction in question Graham was depositing, upon his own account, grain in his warehouse or elevator in common mass, and shipping therefrom, and that the plaintiffs knew it. We have then the question whether, such being the fact, the title to plaintiffs' grain under their receipts passed to Graham.

It is a common thing, we believe, for proprietors of elevators to employ them for the deposit of their own grain, if they have any, in

common mass with others' grain. Depositors, we think, generally know this, and consent that their grain may be mixed not only with grain belonging to third persons, but with grain belonging to the proprietor, if he should have any. This mode of doing business seems to be demanded by considerations of economy. Now we are asked to hold that such depositors lose title to their grain immediately upon its being deposited, and that the receipts issued to them, though expressly calling for grain, are no evidence of a claim for grain, but at best are merely evidence of a claim for money, and are good or otherwise, according as the maker is or is not responsible. It is contended that such deposits of grain are like general bank deposits of money. In our opinion, however, there is a very important difference. In case of a general bank deposit it is understood that the bank will use it in its own way. It is from the use of deposits that the bank is to receive its compensation for receiving the deposits and accounting for the same. It is true that as grain has a definite and well-recognized market value it would not, ordinarily, make much difference to the receipt holder whether he received the grain which his receipt called for, or was paid its market value in cash. But the rule contended for would make a great difference in the safety of the receipt holder. In our opinion it cannot be sustained either upon principle or authority. The cases above cited as relied upon by appellant's counsel are none of them in point. In all of them there was enough in the receipts, or in the circumstances, or both, to evince an understanding upon the part of the depositor that the warehouseman should have a right to sell the thing deposited upon his own account, or otherwise appropriate it to his own use. Such an understanding does not exist upon the part of grain receipt holders by reason of a mere agreement that the warehouseman may mix his own grain with theirs and draw out and sell the same amount. In such case the warehouseman becomes a tenant in common like any other depositor, and may be permitted to enjoy the same right of severance without affecting the title of his co-tenants.

NOTE. — In *Johnston v. Browne*, 37 Iowa, 200, it was shown that it was the custom of the warehouseman always to keep on hand a sufficient amount of grain of the same quality as that stored to meet all outstanding storage receipts, and the transaction was held to be a sale. But it is not plain from the opinion that the court considered this custom to have been incorporated into the contract between the depositor and the warehouseman.

It is submitted that, whenever the warehouseman has obligated himself to keep on hand sufficient grain to meet all outstanding receipts, he should be deemed a bailee, and not a vendee; under such circumstances, the depositor has not intended to part with his right *in rem*, and to accept a right *in personam* in lieu thereof.



## LEDYARD v. HIBBARD.

48 Mich. 421. 1882.

COOLEY, J. Replevin for a quantity of wheat. The following facts were developed on the trial:

The firm of Hibbard & Graff, composed of Wellington Hibbard and Peter Graff, Jr., were merchant millers in Grand Rapids, owning and operating two mills, known respectively as the Crescent and the Valley City. With each mill was an elevator in which they stored wheat for their own purposes, and also received and stored for farmers and others. Plaintiff, from time to time, from March, 1878, to March, 1880, delivered to them wheat which they received into their elevators. The manner of doing the business was as follows: The wheat was drawn from the plaintiff's farm in wagons, discharged into the weighing hopper and elevated into the mills, where it was deposited in bins with other wheat of like kind and quality. A slip or ticket specifying the weight of the load was delivered to the driver of the team, and when a sufficient number of these were gotten together the plaintiff surrendered them to the firm, and received in lieu a receipt on a printed blank. The receipts taken were all of the same form, and the following is a copy of one of them:

"No. 96.

820 bus.

Crescent Mills.

GRAND RAPIDS, MICH., March 26, 1878.

Received of William B. Ledyard by L. Byrne 820 bushels number One wheat at owner's risk from elements, at 10 cents less Detroit quotations for same grade when sold to us. Stored for ——— days.

HIBBARD &amp; GRAFF."

The wheat was all stored with plaintiff's knowledge in bins, from which the firm drew from day to day for the purposes of their business and manufacture. The quantity in the bins changed from day to day as it was depleted by drafts and replenished by new deposits. No storage was ever charged, and the dealings between the parties remained entirely unsettled and open until the failure of Hibbard & Graff in March, 1880. Plaintiff, according to his evidence, then demanded his wheat, and failing to obtain it brought this suit. The defendants undertook to show that he demanded not the wheat but the price of it; but on this point the verdict of the jury was against them.

Upon the facts the question of law is presented whether the receipts which the plaintiff took from the firm evidenced a sale or a bailment. If the wheat was sold to Hibbard & Graff when it was delivered to them, it was not pretended that this action would lie; but the plaintiff contended that the delivery of the wheat constituted

a bailment, and that it was at his option afterwards to take the value at ten cents less than Detroit quotations, or to receive back the wheat or an equal quantity of the same kind and quality. Storage in the elevators with other wheat, it was claimed, only makes the plaintiff owner in common with others, and he had a right to reclaim his own at any time, so long as the requisite quantity remained. The defendants, on the other hand, contended that the case differed radically from the ordinary case of the storage of grain in elevators. The wheat deposited in this case became part of a common stock with the wheat of the millers themselves, and was in their hands for consumption in their discretion; the millers might use and consume as their own the whole; it was not delivered to them for the primary purpose of storage *simpliciter*, but in addition to the bailment it was with the understanding that it might be and would be put into the current consumable stock. And the general proposition is asserted that where grain is deposited with any person with the understanding that he may use it on his own account, and when the depositor desires to sell, that the other will pay the highest price, or return a like quantity or quality, the transaction, if not an immediate sale, is a sale at the option of the receiver. *Nelson v. Brown*, 44 Iowa, 455; *Sexton v. Graham*, 53 Iowa, 181; *Nelson v. Brown*, 53 Iowa, 555.

It was agreed on both sides that the "owner" mentioned in the receipt must be understood to be the depositor — the plaintiff. As by the receipt the grain was declared to be at his risk, for the time being, it must have continued to be at his risk until some act was afterwards done by one party or the other to convert what at first was manifestly a bailment into a sale. The plaintiff could not be creditor for the purchase price so long as he remained owner, and the receiptors could not be debtors for the purchase price so long as the risks of accidental destruction remained upon the depositor. The depositor would convert the bailment into a sale by notifying the receiptors of his election to receive the price fixed according to the terms of the contract; and the receiptors, it is claimed, would convert it into a sale by consuming the wheat in the regular course of their business, as the parties must have understood it was likely they would do.

The question now made could not have arisen if the warehousemen had not been millers as well. But unless the local usage, or the course of dealings between the parties referred to further on, shall be found to affect the case, the fact that the receiptors for the wheat transacted business in the two capacities of warehousemen and millers, would not be of importance, and certainly could not affect the construction of their business contracts. If as warehousemen they gave warehouse receipts for grain received in store, the receipts must be construed by their terms and by commercial usage; in commercial circles they would be understood to represent the title to the

quantity of grain specified; and though the quantity in store might fluctuate from day to day as grain would be received and delivered out, this would not affect the title of the holder of receipts, who would be at liberty to demand and receive his proper quantity at any time, if so much remained in store. But if the quantity in store is reduced by consumption instead of by shipment or sale, it is not apparent that the rights of the holder of the receipts should be any different. It is true if the wheat is all consumed, and the amount in store is not kept good so that a demand for the wheat can be responded to, and if the consumption is by consent of the owner, express or implied, the consumption under such circumstances may be justly regarded as a meeting of the minds of the parties upon a sale; but so long as grain is kept in store from which the receipts may be met, the fair presumption is that it is intended they shall be so met; and this presumption would only be overcome by some act unequivocal in its nature.

The circuit judge instructed the jury that in the absence of any election by the plaintiff to take the price, the bailment continued so long as any portion of the wheat deposited by the plaintiff remained in store, and he was entitled to take the quantity specified in his receipts from any that remained in store with which his own wheat had been mingled. The judge may perhaps have erred in attaching importance to the question whether any portion of the identical grain deposited by the plaintiff remained in store, but if so the error favored the defendants and they cannot complain of it. ✓

There are other questions, however, arising upon an offer of defendants to show a local usage, in the light of which they claim the receipts are to be construed; and also a course of dealing between the parties which it is supposed will bear upon the construction. The evidence upon these subjects was received by the circuit judge provisionally, but afterwards stricken out.

The evidence as to the dealings between the parties was not very conclusive in its tendency. Mr. Hibbard testified that he had received wheat from the plaintiff in the same way ever since 1874, and that always when the plaintiff got ready to sell, he called for his pay and received it. Every bailment thus became a sale. His testimony tended to show, also, that Hibbard & Graff were never storers of grain except for the purposes of manufacture. The plaintiff himself testified that he never sold to Hibbard & Graff but twice; the last time being in 1877. But if the receipts which are in evidence imply, as we think they do, an option in the holder to name his time and take the price, or instead thereof to demand the wheat, it cannot be important that under two or many similar receipts the plaintiff had on previous occasions elected to sell. If he found millers here with storage facilities, and stored his grain with them under contracts which reserved to him an option, the reservation of the option

implied that he might on different occasions exercise it differently. An option is reserved to give that liberty; and however often the choice may be exercised the same way, the liberty will still remain while the same contract continues to be entered into. Choosing alike many times can imply no promise or understanding that the same choice shall be made always.

The evidence of local usage was altogether insufficient to establish a custom. It was testified that the millers of Grand Rapids were accustomed to receive wheat in their mills from farmers and others, and that the depositors called when they pleased and took the market price. But there was no evidence of any general usage in Grand Rapids for the millers to receive wheat in store and issue for it receipts like those issued by Hibbard & Graff and which are in question here. The evidence on the other hand rather tended to show that these receipts were in some respects peculiar, and especially in the clause which provided that the wheat should be at the owner's risk. Usage can never change the written stipulations of parties, though it may aid in the explanation of their terms, and perhaps add incidents in respect to which they are silent (*Eager v. Atlas Ins. Co.*, 14 Pick. 141; *Pavey v. Burch*, 3 Mo. 447; *Farrar v. Stackpole*, 6 Me. 154; *Randall v. Smith*, 63 Me. 105; s. c. 18 Am. Rep. 200; *Boorman v. Jenkins*, 12 Wend. 566; *Dawson v. Kittle*, 4 Hill, 107; *Erwin v. Clark*, 13 Mich. 10; *N. Y. Iron Mine v. Citizens' Bank*, 44 Mich. 345); and the requirement that it shall be certain, definite, uniform and notorious is imperative. *Kendall v. Russell*, 5 Dana, 501; *Parrott v. Thacher*, 6 Pick. 426; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109. "Doubt must be wholly eliminated from the evidence adduced, or the usage is not well proved." *Adams v. Pittsburg Ins. Co.*, 76 Penn. St. 411, 414. This general principle is illustrated by numerous cases, among which are *Whitney v. Ocean Ins. Co.*, 14 La. 485; s. c. 33 Am. Dec. 598; *Patton v. Magrath*, Dudley, 159; s. c. 31 Am. Dec. 552; *Touro v. Cassin*, 1 Nott & McC. 173; s. c. 9 Am. Dec. 680; *Walls v. Bailey*, 49 N.Y. 464; *Harris v. Tumbridge*, 83 N.Y. 92; *Isham v. Fox*, 7 Ohio St. 321; *Harper v. Pound*, 10 Ind. 32; *Lamb v. Klaus*, 30 Wis. 94; *Hinton v. Coleman*, 45 Wis. 165; *Kilgore v. Bulkley*, 14 Conn. 390; *Bissell v. Ryan*, 23 Ill. 566; *Leggat v. Sands Ale Co.*, 60 Ill. 158; *Walsh v. Mississippi &c. Co.*, 52 Mo. 434; *Ober v. Carson*, 62 Mo. 209; *Smith v. Gibbs*, 44 N.H. 335; *McMasters v. Railroad Co.*, 69 Penn. St. 374; *Potts v. Aechternmacht*, 93 Penn. St. 138.

The jury gave their verdict for the plaintiff under instructions which were unexceptionable, and the judgment in his favor must be affirmed with costs.

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## BOOK III.

### LIENS AND PLEDGES.

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#### CHAPTER I.

#### ACQUISITION AND ENFORCEMENT.

##### *A. Specific Liens.*

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#### SKINNER v. UPSHAW.

2 *Ld. Raym.* 752. 1702.

THE plaintiff brought an action of trover against the defendant, being a common carrier, for goods delivered to him to carry, etc. Upon not guilty pleaded, the defendant gave in evidence, that he offered to deliver the goods to the plaintiff, if he would pay him his hire; but that the plaintiff refused, etc., and therefore he retained them. And it was ruled by HOLT, chief justice, at Guildhall (the case being tried before him there) May 12, 1 Ann. reg. 1702, that a carrier may retain the goods for his hire; and upon direction, the defendant had a verdict given for him.

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#### THOMPSON v. LACY.

3 *B. & Ald.* 283. 1820.

TROVER for goods. Plea, not guilty. At the trial before ABBOTT, C.J., at the *London* sittings after last *Trinity* term, it appeared the defendant kept a house of public entertainment, called *The Globe Tavern and Coffee House*, in *Fore Street, Moorgate*, where he provided lodging and entertainment for travellers and others. No stage coaches or waggons stopped there, nor were there any stables belonging to the house. The plaintiff, in *December*, 1818, having lived before that time in furnished lodgings in *London*, went to the defendant's house and engaged a bed; he continued to reside there for several months, and then left the place. The defendant, in his bill, charged for eighty-three nights' lodging; and claimed to detain the goods mentioned in the declaration, on account of money due to

him for lodging and entertainment provided for the plaintiff. Upon these facts, the Lord Chief Justice was of opinion, that the defendant had a lien upon the goods, and the plaintiff was nonsuited.

ABBOTT, C.J. The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travellers. We should otherwise be obliged to say, that a person who arrives at a house of public entertainment in a post-chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveller, and that the landlord who gave him the accommodation required, would be an innkeeper: and yet that if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice enquiry in each particular case. It seems to me, therefore, that it would be better, both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns. By so deciding, the guest will have the protection of the law for the security of his goods, if they are lost or stolen, and the person who keeps the house will also have the benefit of the law, which allows him to retain the goods of his guest to insure the payment of his demand. I am now speaking of a case where the party was in the habit of sleeping in the house. As I cannot, therefore, distinguish a house like that of the defendant, who furnishes every accommodation to all persons for a night or longer, from a country inn, I think that the nonsuit was right, and that this rule must be discharged.

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BEVAN v. WATERS.

Moo. & Mal. 235. 1828.

BEST, C.J. The question in the cause was, whether the defendant was liable to the plaintiff for the training of a race-horse, which the defendant had bought of a third person, whilst in the plaintiff's possession, and which had been given up to the defendant, under an agreement, as was contended, to pay for the training, in consideration of the abandonment of the plaintiff's lien. The defendant contended that there was no lien, and the detention was altogether wrongful, under the authority of *Wallace v. Woodgate*, R. & M. N. P. C. 193.

It was certainly held in that case, on the authority of *Yorke v. Grenaugh*, 2 Lord Raymond, 866, that a livery-stable keeper has no lien; but this case goes farther, and on the principle of the common law, that where the bailee expends labour and skill in the improvement of the subject delivered to him, he has a lien for his charge, I think the trainer has a lien for the expense and skill bestowed in bringing the horse into condition to run at races.

*Verdict for the plaintiff.*

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JACKSON v. CUMMINS.

5 M. & W. 342. 1839.

TRESPASS for breaking and entering an outhouse and premises belonging to the plaintiff, and seizing and driving away ten cows, the property of the plaintiff, and converting and disposing of the same to the defendants' own use, etc.

The defendants pleaded, first, not guilty; secondly, as to taking, etc., two of the cows, that the said cows, for the space of eight months before the said time when, etc., had been depastured, agisted, and fed by the defendant Charles Cummins for the plaintiff, in and upon certain lands of him the said Charles Cummins, at the request of the plaintiff, for a certain reward and remuneration to be paid the said Charles Cummins by the plaintiff, and there was and still is due and owing to the said C. Cummins from the plaintiff the sum of 16*l.* 5*s.*, for and in respect of the said agistment of the said two cows: and that it was agreed between the plaintiff and defendant Charles Cummins, that the said C. Cummins should retain, have, and take and keep the possession of the said two cows so long as the said sum of 16*l.* 5*s.* should remain unpaid: that the said two cows then and at the time of the said agreement were in the possession of the said C. Cummins, and so remained until the plaintiff fraudulently, unlawfully, and wrongfully took them out of the same as hereinafter mentioned; that afterwards, and after the said agreement, and whilst the said two cows were in the possession of the said C. Cummins under the same, and whilst the said C. Cummins had a lien upon the same by law and by the agreement aforesaid, and just before the said time when, etc., the plaintiff wrongfully, unlawfully, and surreptitiously, and contrary to the said agreement, with force and arms, broke and entered the said close of the said C. Cummins in which the said two cows were depasturing and agisting as aforesaid, and wrongfully, fraudulently, unjustly, and unlawfully took, carried, and drove away the same out of the said close of the said C. Cummins, and put and placed the same in the said outhouse and premises in the declaration mentioned,

without paying the said sum so agreed to, and then due to the said C. Cummins. The plea concluded with a justification by the defendant Cummins in his own right, and by the other defendants as his servants, in peaceably entering the outhouse and premises, in order to retake the cattle, and retaking them accordingly.

The plaintiff took issue on the first plea, and to the second replied *de injuria*.

The cause was tried before PARKE, B., at the last Assizes for Yorkshire, when it was proved that the cows had been depastured on land belonging to the defendant. The jury found that there was no such agreement as stated in the plea, that the defendant should retain and keep possession of the cows until the amount due for the pasturage was paid, and thereupon found a verdict for the plaintiff, the learned judge reserving leave to the defendant to move to enter a nonsuit, in case the court should be of opinion that a lien existed at common law for the agistment of cattle. Alexander obtained a rule accordingly.

PARKE, B. I am of opinion that this rule ought to be discharged. The first question is, whether it was competent for the defendant, under this plea, which speaks of a lien by agreement, to set up a claim for a lien at common law? If it were necessary to decide that question, I should say that I think it was competent for him to do so. The plaintiff, it is true, might have demurred specially to the plea for duplicity, in setting up two distinct grounds of lien, viz. by force of an agreement, and by the general law; but as it is, the averment of the agreement for a lien may be rejected, and the claim of lien under the general law supported, should such really exist. I also think that, after the recent decision in *Owen v. Knight*, 4 Bing. N.C. 54; 5 Scott, 307, as to the effect of lien in actions of trover, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows; which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass. It is not, however, necessary to decide either of these points, because I think that by the general law no lien exists in the case of agistment. The general rule, as laid down by BEST, C.J., in *Bevan v. Waters*, and by this court in *Scarfe v. Morgan*, is, that by the general law, in the absence of any special agreement, whenever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now, the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly by means of any instrument in his possession, as was the case with the stallion in *Scarfe v. Morgan*; he simply takes in the animal to feed it. In addition to which, we have the express author-



ity of *Chapman v. Allen*, that an agister has no lien; and although possibly that case may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have proceeded on the more general principle, that no lien can exist in the case of agistment; and it was so understood by this Court in *Judson v. Etheridge*. The analogy, also, of the case of the livery-stable keeper, who has no lien by law, furnishes an additional reason why none can exist here; for this is a case of an agistment of milch cows, and, from the very nature of the subject-matter, the owner is to have possession of them during the time of milking; which establishes that it was not intended that the agister was to have the entire possession of the thing bailed: and there is nothing to shew that the owner might not, for that purpose, have taken the animals out of the field wherein they were grazing, if he had thought proper so to do. This claim of lien is therefore inconsistent with the necessary enjoyment of the property by the owner. As to the case of the training groom it is not necessary to say anything, as it has not been formally decided; for in *Jacobs v. Latour*, 5 Bing. 130; 2 M. & P. 201, the point was left undetermined. It is true, there is a Nisi Prius decision of BEST, C.J., in *Bevan v. Waters*, that the trainer would have a lien, on the ground of his having expended labour and skill in bringing the animal into condition to run at races; but it does not appear to have been present to the mind of the Judge, nor was the usage of training to that effect explained to him, that when horses are delivered for that purpose, the owner has always a right, during the continuance of the process, to take the animal away for the purpose of running races for plates elsewhere. The right of lien, therefore, must be subservient to this general right, which overrides it; so that I doubt if that doctrine would apply where the animal delivered was a race-horse, as that case differs much from the ordinary case of training. I do not say that the case of *Bevan v. Waters* was wrongly decided; I only doubt if it extends to the case of a race-horse, unless perhaps he was delivered to the groom to be trained for the purpose of running a specified race, when of course these observations of mine would not apply. But, at all events, I am clear that this agister has no lien, as his case certainly does not come within the general principles which have been established: in addition to which, such a claim would be inconsistent with the more general right exerciseable by the owner of the cattle.

*Rule discharged.*

NOTE. — The student will find an explanation of the rule that an agister has no lien suggested by the late Dean Ames in 2 H. L. R. 61.

## STEINMAN v. WILKINS.

7 W. &amp; S. (Pa.) 466. 1844.

THE plaintiff brought this action of trover against the defendant, who is a warehouseman in Clarion County, on the Allegheny River, for the supposed conversion of certain goods retained for the price of warehouse room, being part of a larger lot which was stored in his warehouse by Hamilton & Humes, of whom the plaintiff is the general assignee. The greater part had been delivered to Hamilton & Humes, and the residue having been demanded without tender of any charges, M'CALMONT (President of the Common Pleas of Clarion County) directed the jury that though the defendant could not retain for the general balance of his account, he might retain for all the charges on all the goods forwarded to him at the same time.

The opinion of the court was delivered by

GIBSON, C.J. Though a plurality of the barons in *Rex v. Humphrey*, 1 M'Clell. & Y. 194-95, dissented from the dictum of Baron GRAHAM that a warehouseman has a lien for a general balance, like a wharfinger, I do not understand them to have intimated that he has no lien at all. They spoke of it as an entity, and seem to have admitted that he has a specific lien, though not a general one. There is a well-known distinction between a commercial lien, which is the creature of usage, and a common-law lien, which is the creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property. Commercial or general liens, which have not been fastened on the law merchant by inveterate usage, are discountenanced by the courts as encroachments on the common law; and for that reason it would be impossible to maintain the position of Baron GRAHAM, for there is no evidence of usage as a foundation for it, and no text-writer has treated of warehouse room as a subject of lien in any shape. In *Rex v. Humphrey*, it was involved in the discussion only incidentally; and I have met with it in no other case. But there is doubtless a specific lien provided for it by the justice of the common law. From the case of a chattel bailed to acquire additional value by the labour or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet, in the recent case of *Jackson v. Cummins*, 5 Mees. & Welsb. 342, it was held to extend no further than to cases in which the bailee has directly conferred additional value by labour or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not

increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters*, Mood. & Malk. 235, in which a trainer was allowed to retain for fitting a race-horse for the turf. In *Jackson v. Cummins* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Scarfe v. Morgan*, 4 Mees. & Welsb. 270, the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world. Before *Chase v. Westmore*, 5 Maule & Selw. 180, there was no lien even for work done under a special agreement; now, it is indifferent whether the price has been fixed or not. In that case, Lord ELLENBOROUGH, alluding to the old decisions, said that if they "are not supported by law and reason, the convenience of mankind certainly requires that our decisions should not be governed by them;" and Chief Justice BEST declared in *Jacobs v. Latour*, 5 Bingh. 132, that the doctrine of lien is so just between debtor and creditor, that it cannot be too much favoured. In *Kirkham v. Shawcross*, 6 T. R. 17, Lord KENYON said it had been the wish of the courts, in all cases and at all times, to carry the lien of the common law as far as possible; and that Lord MANSFIELD also thought that justice required it, though he submitted when rigid rules of law were against it. What rule forbids the lien of a warehouseman? Lord ELLENBOROUGH thought in *Chase v. Westmore*, that every case of the sort was that of a sale of services performed in relation to a chattel, and to be paid for, as in the case of any other sale, when the article should be delivered. Now, a sale of warehouse room presents a case which is bound by no pre-established rule or analogy; and, on the ground of principle, it is not easy to discover why the warehouseman should not have the same lien for the price of future delivery and intermediate care that a carrier has. The one delivers at a different time, the other at a different place; the one after custody in a warehouse, the other in a vehicle; and that is all the difference. True, the measure of the carrier's responsibility is greater; but that, though a consideration to influence the quantum of his compensation, is not a consideration to increase the number of his securities for it. His lien does not stand on that. He is bound in England by the custom of the realm to carry for all employers at established prices; but it is by no means certain that our ancestors brought the principle with them from the parent

country as one suited to their condition in a wilderness. We have no trace of an action for refusing to carry; and it is notorious that the wagoners, who were formerly the carriers between Philadelphia and Pittsburgh, frequently refused to load at the current price. Now, neither the carrier nor the warehouseman adds a particle to the intrinsic value of the thing. The one delivers at the place, and the other at the time, that suits the interest or the convenience of the owner of it, in whose estimation it receives an increase of its relative value from the services rendered in respect of it, else he would not have undertaken to pay for them. I take it, then, that, in regard to lien, a warehouseman stands on a footing with a carrier, whom in this country he closely resembles.

Now, it is clear from *Sodergren v. Flight & Jennings*, cited East, 662, that where the ownership is entire in the consignee, or a purchaser from him, each parcel of the goods is bound, not only for its particular proportion, but for the whole, provided the whole has been carried under one contract; it is otherwise where to charge a part for the whole would subject a purchaser to answer for the goods of another, delivered by the bailee with knowledge of the circumstances. In this instance, the entire interest was in Hamilton & Humes, in whose right the plaintiff sues; and the principle laid down by the presiding Judge was substantially right. On the other hand, the full benefit of it was not given to the defendant in charging that the demand and refusal was evidence of conversion. There was no evidence of tender to make the detention wrongful; and the defendant would have had cause to complain, had the verdict been against him, of the direction to deduct the entire price of the storage from the value of the articles returned, and to find for the plaintiff a sum equal to the difference. But there has been no error which the plaintiff can assign.

*Judgment affirmed.*

NOTE. — The reasoning of GIBSON, C.J., respecting a lien for an agister, was approved in *Kelsey v. Layne*, 28 Kan. 218, 223, and the Pennsylvania court has decided that an agister has a common law lien. *Yearsley v. Gray*, 140 Pa. 238. But in the United States the great weight of authority is to the effect that neither an agister nor a livery-stable keeper has a lien. See *Hickman v. Thomas*, 16 Ala. 666; *Lewis v. Tyler*, 23 Cal. 364; *Goodrich v. Willard*, 7 Gray (Mass.) 183.

This result has, however, been very frequently changed by statute.

Everywhere in the United States a person regularly engaged in business as a warehouseman has a lien for his storage charges. See *Scott v. Jester*, 13 Ark. 437; *Low v. Martin*, 18 Ill. 286; *Stoddard v. Crocker*, 100 Me. 450; *Shingleur-Johnson v. Canton Warehouse Co.*, 78 Miss. 875, and the cases cited in the following paragraph of this note. Frequently this right is confirmed, or enlarged, by statute.

If goods are received under one contract, and part delivered without the payment of charges, the warehouseman may hold the balance for the charges upon all the goods. *Barker v. Brown*, 138 Mass. 340; *Schmidt v. Blood*, 9 Wend. (N.Y.) 268; *Devereux v. Fleming*, 53 Fed. Rep. 401.

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DE VINNE v. RIANHARD.

9 Daly (N.Y.) 406. 1880.

APPEAL from a judgment of this court entered on the report of a referee.

The action was brought to foreclose a lien claimed by the plaintiffs upon certain type, for printing and other work done by them for the defendants, the owners of the type. The plaintiffs were printers, and had for many years printed for the defendant, the McKillop & Sprague Company, of which the defendant Rianhard had been appointed receiver, a commercial register, published semi-annually, giving the financial standing of merchants throughout the United States. The company had purchased a large quantity of type for printing its register, the greater portion of which was usually left standing as set up in pages for the issue of each edition of the book until the time came for printing the next edition, when the practice was, instead of setting up the type anew, to merely make such corrections and changes as might be rendered necessary by changes in the matters to be published.

The action was referred by consent, and upon trial the referee found for the plaintiffs. His report was confirmed; and judgment thereon was directed for the plaintiffs. From the judgment the defendant Rianhard appealed.

CHARLES P. DALY, Chief Justice. — The plaintiffs, in my opinion, had no lien upon the type. It was held in *Bleaden v. Hancock*, Mood. & M. 465, that a printer has no lien upon stereotype plates which are left with him to print from; and I can see no distinction, so far as respects the right of lien, between type, as such, and stereotype plates. Cross, a careful and very reliable elementary writer on the law of lien says, as the result of the cases when his book was written, forty years ago, that "the courts have recognized and allowed without restriction, the right of every bailee to a lien on the goods bailed to him, *where any additional value has been conferred by him on the chattel*, either directly by the exercise of personal labor and skill or indirectly by the intermediate use of any instrument over which he has control;" and that the right, when it does not exist from usage, or is not obtained by contract, depends upon whether any additional value has been conferred by the bailee on the chattel, may be illustrated by the decision in *Jackson v. Cummins*, 5 Mees. & W. 342,

that an agister, or one who takes charge of horses or cattle, has no lien for their keep, because he does not confer any additional value on the animal but merely takes charge of it and feeds it; and the decision in *Scarfe v. Morgan*, 4 Mees. & W. 270, that one who receives a mare to be covered by a stallion has a lien, as the mare may be made more valuable, by proving in foal; in the first of which cases, Baron PARKE declares the rule to be as follows: The general rule is, in the absence of any special agreement, that, whenever a party has expended labor and skill in the *improvement of a chattel* bailed to him, he has a lien upon it. This rule has been questioned in *Steinman v. Wilkins*, 7 Watts & S. 466; but has been adhered to in this and other states, *Grinnell v. Cook*, 3 Hill, 491; *Morgan v. Congdon*, 4 N.Y. 553; *Pinney v. Wells*, 10 Conn. 105; *Cummings v. Harris*, 3 Vt. 244; and if it is to be departed from, it must be left to the court of appeals to do so. It is not for this court to overturn or disregard a long line of authorities. The respondent relies upon the rule as it is laid down by Senator VERPLANK in *McFarland v. Wheeler*, 26 Wend. 467: "That every man who has lawful possession of anything upon which he has expended his money, labor or skill, at the request of the owner, has a right to detain it as security for his debt." This is a loose statement of the rule, which is more correctly laid down by JEWETT, J., in *Morgan v. Congdon*, 4 N.Y. 553, as follows: that "Every bailee for hire, who by his labor and skill *has imparted an additional value to the goods*, has a lien upon the property for the payment of his reasonable charges," which is the rule that must be applied in this case.

The type from which the plaintiffs printed the "Register," from time to time, for the McKillop & Sprague Company, was furnished by the company, and belonged to them. It cannot be assumed that the value of it, as type, was enhanced by the plaintiffs' printing from it. On the contrary, if there is any inference, it is that the constant use and printing from the type would diminish its value. The plaintiffs had a lien upon the book printed from the type, for that was a thing produced by their labor and skill; but I fail to see how, under the rule established by the authorities cited, they could acquire, except by contract, any lien upon the type, which was purchased by the McKillop & Sprague Company, and left with the plaintiffs to print from.

*Judgment reversed.*

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NICHOLSON v. CHAPMAN.

2 H. Black. 254. 1793.

CERTAIN timber of Nicholson was accidentally loosened from a dock on the river Thames, was carried by the tide a considerable distance, and left at low water on a towing-path. Chapman found it.

and placed it beyond the reach of the water at high tide. Nicholson demanded the timber from Chapman, and Chapman refused to deliver it until he was paid for his trouble.

LORD CHIEF JUSTICE EYRE. It is therefore a case of mere finding, and taking care of the thing found (I am willing to agree) for the owner. This is a good office, and meritorious, at least in the moral sense of the word, and certainly entitles the party to some reasonable recompence from the bounty, if not from the justice of the owner; and of which, if it were refused, a court of justice would go as far as it could go towards enforcing the payment. So it would if a horse had strayed, and was not taken as an estray by the lord under his manorial rights, but was taken up by some good-natured man and taken care of by him, till at some trouble, and perhaps at some expense, he had found out the owner. So it would be in every other case of finding that can be stated (the claim to the recompence differing in degree, but not in principle); which therefore reduces the merits of this case to this short question, Whether every man who finds the property of another which happens to have been lost or mislaid, and voluntarily puts himself to some trouble and expense to preserve the thing, and to find out the owner, has a lien upon it for the casual, fluctuating, and uncertain amount of the recompence which he may reasonably deserve? It is enough to say, that there is no instance of such a lien having been claimed and allowed; the case of a pointer dog was a case in which it was claimed and disallowed, and it was thought too clear a case to bear an argument. Principles of public policy and commercial necessity support the lien in the case of salvage. Not only public policy and commercial necessity do not require that it should be established in this case, but very great inconvenience may be apprehended from it if it were to be established. The owners of this kind of property, and the owners of craft upon the river, which lie in many places moored together in large numbers, would not only have common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn their floats and vessels adrift in order that they might be paid for finding them. I mentioned in the course of the cause another great inconvenience, namely, the situation in which an owner, seeking to recover his property in an action of trover, will be placed, if he is at his peril to make a tender of a sufficient recompence before he brings his action: such an owner must always pay too much, because he has no means of knowing exactly how much he ought to pay, and because he must tender enough. I know there are cases in which the owner of property must submit to this inconvenience; but the number of them ought not to be increased: perhaps it is better for the public that these voluntary acts of benevolence from one man to another, which are charities and moral duties, but not legal duties, should

depend altogether for their reward upon the moral duty of gratitude. But at any rate, it is fitting that he who claims the reward in such case should take upon himself the burthen of proving the nature of the service which he has performed, and the *quantum* of the recompence which he demands, instead of throwing it upon the owner to estimate it for him, at the hazard of being non-suited in an action of trover.

*Judgment for the plaintiff.*

NOTE. — In *Reeder v. Anderson's Administrators*, 4 Dana (Ky.) 193, ROBERTSON, C.J., said: —

"The only question to be considered in this case is, whether the law will imply a promise, by the owner of a runaway slave, to pay a reasonable compensation to a stranger for a voluntary apprehension and restitution of the fugitive. And, though such friendly offices are frequently those only of good neighborhood, which should not be influenced by mercenary motives or expectations — nevertheless, it seems to us that there is an implied request from the owner, to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property."

See, *accord*, *Chase v. Corcoran*, 106 Mass. 286; *Amory v. Flynn*, 10 Johns. (N.Y.) 102, 103. See, *contra*, *Watts v. Ward*, 1 Oreg. 86.

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WENTWORTH v. DAY.

3 Met. (Mass.) 352. 1841.

THIS action, which was trover for a watch, was submitted to the court on the following statement of facts:

The plaintiff lost the watch mentioned in his declaration, about the middle of October 1839, in Bradford, in the county of Essex, and put the following advertisement into the *Essex Banner*, a newspaper published at Haverhill in said county: "Twenty Dollars reward. Lost, upon the road from Haverhill to Brighton, about two miles from Haverhill Bridge, a gold lever watch. Whoever will return it to this office shall receive the above reward. Francis Wentworth. Oct. 12."

The watch was found, a few days afterwards, by a minor son of the defendant, who delivered it to the defendant, and he took the custody of it for his son, and very soon afterwards left it at the printing office of the *Banner*, in the care of the printer, with directions to deliver it to the owner, on his paying the \$20 reward.



In the month of January 1840, the plaintiff returned to Haverhill, and on his refusing to pay the \$20, the defendant resumed the possession of the watch, and while it was thus in his possession, the plaintiff demanded it of him, but he refused to deliver it, unless the plaintiff would pay him the \$20 for his son. The plaintiff refused to do this, but said he would pay \$10. The defendant refused to deliver the watch, and the plaintiff brought this action.

SHAW, C.J. Although the finder of lost property on land has no right of salvage, at common law, yet if the loser of property, in order to stimulate the vigilance and industry of others to find and restore it, will make an express promise of a reward, either to a particular person, or in general terms to any one who will return it to him, and, in consequence of such offer, one does return it to him, it is a valid contract. Until something is done in pursuance of it, it is a mere offer, and may be revoked. But if, before it is retracted, one so far complies with it as to perform the labor, for which the reward is stipulated, it is the ordinary case of labor done on request, and becomes a contract to pay the stipulated compensation. It is not a gratuitous service, because something is done which the party was not bound to do, and without such offer might not have done. *Symmes v. Frazier*, 6 Mass. 344.

But the more material question is, whether, under this offer of reward, the finder of the defendant's watch, or the father, who acted in his behalf and stood in his right, had a lien on the watch, so that he was not bound to deliver it till the reward was paid.

A lien may be given by express contract, or it may be implied from general custom, from the usage of particular trades, from the course of dealing between the particular parties to the transaction, or from the relations in which they stand, as principal and factor. *Green v. Farmer*, 4 Bur. 2221. In *Kirkman v. Shawcross*, 6 T. R. 14, it was held, that where certain dyers gave general notice to their customers, that on all goods received for dyeing, after such notice, they would have a lien for their general balance, a customer dealing with such dyers, after notice of such terms, must be taken to have assented to them, and thereby the goods became charged with such lien, by force of the mutual agreement. But in many cases the law implies a lien, from the presumed intention of the parties, arising from the relation in which they stand. Take the ordinary case of the sale of goods, in a shop or other place, where the parties are strangers to each other. By the contract of sale, the property is considered as vesting in the vendee; but the vendor has a lien on the property for the price, and is not bound to deliver it, till the price is paid. Nor is the purchaser bound to pay, till the goods are delivered. They are acts to be done mutually and simultaneously. This is founded on the legal presumption, that it was not the intention of the vendor to part with his goods till the price should be

paid, nor that of the purchaser to part with his money till he should receive the goods. But this presumption may be controlled, by evidence proving a different intent, as that the buyer shall have credit, or the seller be paid in something other than money.

In the present case, the duty of the plaintiff to pay the stipulated reward arises from the promise contained in his advertisement. That promise was, that whoever should return his watch to the printing office should receive twenty dollars. No other time or place of payment was fixed. The natural, if not the necessary implication is, that the acts of performance were to be mutual and simultaneous: the one to give up the watch, on payment of the reward; the other to pay the reward, on receiving the watch. Such being, in our judgment, the nature and legal effect of this contract, we are of opinion that the defendant, on being ready to deliver up the watch, had a right to receive the reward, in behalf of himself and his son, and was not bound to surrender the actual possession of it till the reward was paid; and therefore a refusal to deliver it, without such payment, was not a conversion.

It was competent for the loser of the watch to propose his own terms. He might have promised to pay the reward at a given time after the watch should have been restored, or in any other manner inconsistent with a lien for the reward on the article restored; in which case, no such lien would exist. The person restoring the watch would look only to the personal responsibility of the advertiser. It was for the latter to consider, whether such an offer would be equally efficacious in bringing back his lost property, as an offer of a reward secured by a pledge of the property itself; or whether, on the contrary, it would not afford to the finder a strong temptation to conceal it. With these motives before him, he made an offer, to pay the reward on the restoration of the watch; and his subsequent attempt to get the watch, without performing his promise, is equally inconsistent with the rules of law and the dictates of justice.

The circumstance, in this case, that the watch was found by the defendant's son, and by him delivered to his father, makes no difference. Had the promise been to pay the finder, and the suit were brought to recover the reward, it would present a different question. Here the son delivered the watch to the father, and authorized the father to receive the reward for him. If the son had a right to detain it, the father had the same right, and his refusal to deliver it to the owner, without payment of the reward, was no conversion.

*Judgment for the defendant.*

## WILSON v. GUYTON.

8 Gill (Md.) 213. 1849.

## APPEAL from Harford County Court.

This was an action of replevin, instituted by the appellee, for the recovery of a horse which had strayed from the possession of the plaintiff, and had been taken up by one William H. Pearce, and was retained by the defendant as Pearce's agent. The plea was *non cepit*.

At the trial, the defendant proved that the plaintiff was the owner of the horse in question, and that having lost said horse in the month of July, 1847, the plaintiff offered a liberal reward, by advertisement, to any one who would take up said horse, and deliver him to the plaintiff; and that said Pearce, after said advertisement, and in consequence thereof, took up said horse, and offered to deliver him to the plaintiff, upon said plaintiff's paying \$3, as the reward for such taking up. He also further proved, that plaintiff admitted that the sum of \$3 was a reasonable reward, and within the terms of the advertisement, and that defendant held said horse at the time the writ was issued in this case, as the agent of said Pearce. The defendant then prayed the court to direct the jury, "that unless the plaintiff proved, or offered proof that he had, before the institution of this suit, paid the said \$3, the reward aforesaid, or tendered or offered to pay the same, the said plaintiff is not entitled to recover." Which direction the court (ARCHER, C.J., and PURVIANCE, A.J.) refused to give, but instructed the jury, that the said William H. Pearce had no right to retain said horse till the said reward was paid. The defendant excepted, and the verdict and judgment being against him, appealed to this court.

DORSEY, C.J., delivered the opinion of this court.

The doctrine of lien is more favored now than formerly; and it is now recognised as a general principle, that wherever the party has, by his labor or skill, etc., improved the value of property placed in his possession, he has a lien upon it until paid. And liens have been implied when, from the nature of the transaction, the owner of the property is assumed as having designed to create them, or when it can be fairly inferred, from circumstances, that it was the understanding of the parties that they should exist. The existence of liens has also been sustained where they contributed to promote public policy and convenience. If any article of personal property has been lost, or strayed away, or escaped from its owner, and he offers a certain reward, payable to him who shall recover and deliver it back to his possession, it is but a just exposition of his offer, that he did not expect that he who had expended his time and money in the pursuit and recovery of the lost or escaped property, would restore it to him, but upon the payment of the proffered reward,

and that as security for this, he was to remain in possession of the same until its restoration to its owner, and then the payment of the reward was to be a simultaneous act. It is no forced construction of his act, to say that he designed to be so understood by him who should become entitled to the reward. It is, consequently, a lien created by contract. It is for the interest of property holders so to regard it. It doubles their prospect of a restoration of their property. To strangers it is everything; for few, indeed, would spend their time and money, and incur the risks incident to bailment, but from a belief in the existence of such a lien. Public convenience, sound policy, and all the analogies of the law, lend their aid in support of such a principle. Nor are we without an express authority upon this subject. In *Wentworth v. Day*, 3 Metcalf, 352, the supreme court of Massachusetts decided, "that a finder of lost property, for the restoration of which the owner has offered a reward, has a lien on the property, and may retain possession of it, if, on his offer to restore it, the owner refuses to pay the reward."

But, in the case before us, there is no ground for the implication of such a lien from the compact of the parties. There was no fixed or certain reward offered by the owner, to be paid on the delivery of his property. His offer was to pay a "liberal reward." Who was to be the arbiter of the liberality of the offered reward? It cannot be supposed that the owner, by his offer, designed to constitute the recoverer of his property the exclusive judge of the amount to be paid him as a reward. And it is equally unreasonable and unjust, to say that the owner should be such exclusive judge. In the event of a difference between them, upon the subject, the amount to be paid must be ascertained by the judgment of the appropriate judicial tribunal. This would involve the delays incident to litigation, and it would be a gross perversion of the intention of the owner to infer, from his offered reward, an agreement on his part, that he was to be kept out of the possession of his property till all the delays of litigation were exhausted. To the bailee thus in possession of property, such a lien would rarely be valuable, except as a means of oppression and extortion; and, therefore, the law will never infer its existence either from the agreement of the parties, or in furtherance of public convenience or policy.

*Judgment affirmed.*

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BRITISH EMPIRE SHIPPING COMPANY,  
LIMITED, v. SOMES.

E. B. & E. 353. 1858.

THE plaintiffs delivered a ship to the defendants to be repaired. After the repairs were completed, the plaintiffs demanded the ship

and the defendants refused to deliver it until their charges were paid. They notified the plaintiffs that they should charge them an additional amount for the hire of a dock so long as the ship remained with them. This additional charge was later paid under protest, and the plaintiffs now sue to recover back the amount so paid.

LORD CAMPBELL, C.J. We are of opinion that, under the circumstances stated in the special case, the defendants are not entitled to retain the sum paid to them in respect of the item of 567*l.*, or any other sum, as a compensation for the use of their dock in detaining the plaintiffs' ship. As artificers who had expended their labour and materials in repairing the ship which the plaintiffs had delivered to them to be repaired, the defendants had a lien on the ship for the amount of the sum due to them for these repairs; but we do not find any ground on which their claim can be supported to be paid for the use of their dock while they detained the ship under the lien against the will of the owners. There is no evidence of any special contract for such a payment. The defendants gave notice that they would demand 21*l.* a day for the use of their dock during the detention: but the plaintiffs denied their liability to make any such payment, and insisted on their right to have their ship immediately delivered up to them. Nor does any custom or usage appear to authorize such a claim for compensation, even supposing that a wharfinger with whom goods had been deposited, he being entitled to warehouse rent for them from the time of the deposit, might claim a continuation of the payment during the time he detains them in the exercise of right of lien till the arrears of warehouse rent due for them is paid (see *Rex v. Humphrey*, M'C*l.* & Y. 173): there is no ground for a similar claim here, as there was to be no separate payment for the use of the dock while the ship was under repair, and the claim only commences from the refusal to deliver her up. The onus therefore is cast upon the defendants to shew that, by the general law of England, an artificer who, exercising his right of lien, detains a chattel, in making or repairing which he has expended his labour and materials, has a claim against the owner for taking care of the chattel while it is so detained. But the claim appears to be quite novel; and, on principle, there is great difficulty in supporting it either *ex contractu* or *ex delicto*. The owner of the chattel can hardly be supposed to have promised to pay for the keeping of it while, against his will, he is deprived of the use of it; and there seems no consideration for such a promise. Then the chattel can hardly be supposed to be wrongfully left in the possession of the artificer, when the owner has been prevented by the artificer from taking possession of it himself. If such a claim can be supported, it must constitute a debt from the owner to the artificer, for which an action might be maintained: when does the debt arise, and when is the action maintainable? It has been held that a coachmaker cannot claim any right of detainer for standage, unless there be an

express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it; *Hartley v. Hitchcock*, 1 Stark. 408.

The right of detaining goods on which there is a lien is a remedy to the party aggrieved which is to be enforced by his own act; and, where such a remedy is permitted, the common law does not seem generally to give him the costs of enforcing it. Although the lord of a manor be entitled to amends for the keep of a horse which he has seized as an estray (*Henly v. Walsh*, 2 Salk. 686), the distrainer of goods which have been replevied cannot claim any lien upon them; *Bradyll v. Ball*, 1 Bro. C. C. 427. So, where a horse was distrained to compel an appearance in a hundred court, it was held that, after appearance, the plaintiff could not justify detaining the horse for his keep; Bul. N. P. 45.

If cattle are distrained damage feasant, and impounded in a pound overt, the owner of the cattle must feed them; if in a pound covert or close, "the cattle are to be sustained with meat and drink at the peril of him that distraineth, and he shall not have any satisfaction therefor." Co. Litt. 47 b.

For these reasons, on the question submitted to us, we give judgment for the plaintiffs.

*Judgment for the plaintiffs.*

NOTE. — In *Devereux v. Fleming*, 53 Fed. 401, one of the questions was whether a warehouseman had any claim for the storage of goods subsequent to the time when they had been demanded and he had refused to deliver because the charges were not paid. The court said (p. 405): "It is contended with great earnestness and plausibility that, when a warehouseman enforces his lien and refuses to deliver on demand, his custody thenceforward is not under his contract of warehouseman, and for the use and benefit of his customer, but his own protection and benefit. He then has no further right to charge storage. The textbook (Jones, Liens, § 972) and the cases quote (especially *Somes v. Shipping Co.*, 8 H. L. Cas. 338) do not sustain this proposition so broadly stated. Where one is placed in possession of a chattel to do some work on it, and refuses to deliver it when completed until he is paid, he cannot charge storage of that chattel while he is enforcing his lien, because the original contract for repairing and the subsequent implied contract for storage are entirely distinct and separate; but in a case like the present, when the contract is that of storage, and the contract is for the delivery on payment of charges, the right to hold the goods under the original contract does not cease until those charges are paid, released, or tendered. This seems to be the law of this case. As no tender or offer to pay has been made, the warehouse charges still go on."

In *Folsom v. Barrett*, 180 Mass. 439, 442, the owner of a horse

demanding it from a livery-stable keeper without making a proper tender of the amount due for the care of the horse. The court said that the livery-stable keeper might hold the horse for the expense thereafter incurred, or might recover such expense from the owner.

At common law the general rule is that the lienholder has no right to sell the chattel, and satisfy the debt out of the proceeds. Such a right is, however, frequently given by statute.

There are authorities holding that the lienholder may not have the aid of equity to foreclose a lien. *Thames Iron Works Co. v. Patent Derrick Co.*, 1 J. & H. 93; *Burrough v. Ely*, 54 W.Va. 118. And see *Gottstein v. Harrington*, 25 Wash. 508. Probably in ancient times a lien was given by the common law only where the possessor of the chattel, not having made a definite bargain with the owner, was not in a position to maintain an action for the value of his services. So viewed, the lien was not security for a debt, but a substitute for a debt. But the law for centuries has given a lien even if the lienholder had a cause of action for the payment of the services in question. To regard a lien as security for a debt accords with business sense. If a lien is security for a debt, it would seem to follow that equity should supply some method to enforce that security, when there is no adequate remedy at law. This view is supported by *Black v. Brennan*, 5 Dana (Ky.) 310; *Fox v. McGregor*, 11 Barb. (N.Y.) 41; *Knapp Co. v. McCaffrey*, 177 U.S. 638. See also *Boorman v. Wisconsin Engine Co.*, 36 Wis. 207, 212.

*B. General Liens.*

## KRUGER v. WILCOX.

1 Ambl. 252. 1755.

MICO was general agent in England for Watkins, who was a merchant abroad, and at different times had received considerable consignment of goods, and upon the balance of account was in disburse. Afterwards Watkins consigned to him a parcel of logwood, and one of the questions in the case was whether Mico had a lien on this logwood, or its proceeds, for the balance due him.

The LORD CHANCELLOR desired four merchants to attend in court. After having asked them several questions, upon the custom and usage of merchants relating to the matter, his lordship gave his opinion, which was, in part, as follows:—

All the four merchants, both in their examination in the cause, and now in court, agree, that if there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account, as well as for the charges, customs, etc., paid on the account of the particular cargo. They consider it as an interest in the specific things, and make them articles in the general account. Whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say; nor can I find any such case. I have no doubt it would be so in this court, if the goods *remained in specie*; nor do I doubt of its being so, where they are turned into money.

NOTE. — In *Nagle v. McFeeters*, 97 N.Y. 196, the court said (p. 202): “If the defendants had, upon the request of the plaintiff, advanced to him money for his accommodation, in advance of the sale of the goods, they would clearly have had a lien upon the goods, to secure such advances; and their acceptances for plaintiff’s accommodation stood upon the same footing. Such is the general common-law rule between principal and factor, and consignor and consignee. A factor has, in the absence of any express agreement, a lien upon the goods in his hands as his security for all advances made, or acceptances given to his principal in the business of his agency, or connected with the goods consigned to him. The law implies or infers the lien from the relation between the parties.”

In *Brown & Company v. M’Gran*, 14 Pet. 479, 494, Mr. Justice STORY said: “The main objection to the instruction is of a more broad and comprehensive character. The instruction in effect de-



cides that in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion, as to the time and manner of sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale at his pleasure; notwithstanding the factor has, in consideration of such general consignment, already made advances, or incurred liabilities for the consignor, at his request, trusting to the fund for his due reimbursement. We are of opinion that this doctrine is not maintainable in point of law. We understand the true doctrine on this subject to be this: Wherever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein; then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities; unless there is some existing agreement between himself and the consignor, which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities."

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BARNETT v. BRANDAO.

6 M. & G. 630. 1843.

LORD DENMAN, C.J. There are two questions in this case for the determination of the court — one of form, the other of substance. The first, which is one of form, and was not the subject of discussion in the Court of Common Pleas, is, whether the court ought to take notice of the general lien which bankers have on the securities of their customers; or it ought to have been averred, as a matter of fact in the special plea, and found by the jury, that the bankers have such lien.

That such a general lien exists was not disputed; but it was insisted, on the part of the defendant in error, that the foundation of this lien is *usage*, from which a *contract* may be implied between the banker and the customer that the securities belonging to the latter shall be pledged to the former for the balance due to him; and, being matter of implied contract, it should have been pleaded.

On the other hand, the learned counsel for the plaintiff contended that this lien existed by the general custom of trade, constituting the law-merchant, and need not be pleaded, for the court takes notice of that which constitutes the law-merchant. And we agree in this view of the case. The law-merchant forms a branch of the law of England; and those customs which have been universally and notoriously prevalent amongst merchants, and have been found by experience to be of public use, have been adopted as a part of it, upon a principle of convenience, and for the benefit of trade and commerce; and, when so adopted, it is unnecessary to plead and prove them. They are binding on all without proof. Accordingly we find that usages affecting bills of exchange and bills of lading are taken notice of judicially.

In the case of a factor, the right to a general lien at first appears to have been made the subject of proof in the cause; as in *Kruzer v. Wilcox*, cited in 1 Burr. 494, and reported (as *Kruger v. Wilcox*) in Ambler, 252; in a further stage of which case, LORD HARDWICKE, in order to satisfy himself, consulted the four merchants who had given evidence, in open court (a course which would not have been proper if it had been a mere question of fact); and he decreed in favour of a general lien.

Afterwards, in the cases of *Green v. Farmer*, 4 Burr. 2218, and *Drinkwater v. Goodwin*, Cowp. 255, LORD MANSFIELD considers the right as fully established; and certainly, in modern practice, it is treated as a matter of settled law; and no proof is ever required, that such general lien exists, as a matter of fact. The lien of bankers — who are a species of factors in pecuniary transactions — stands on the same footing; and LORD KENYON, in *Davis v. Bowsher*, who had laid down the same law before, in *Jourdaine v. Lefevre*, 1 Esp. N. P. C. 66, declares that he is clearly of opinion, that, *by the general law of the land*, a banker has a general lien upon all the securities in his hands belonging to any particular person, for his general balance. This right was acknowledged, without any evidence in support of it, in *Bolland v. Bygrave*; and it may be said, with equal truth of bankers as of factors, that by the general understanding of the profession, it is never deemed necessary to give evidence of usage in order to support the claim; and it would be productive of great expense and inconvenience if such a course were adopted. We are therefore of opinion that the right to a general lien in the case of a banker need not be pleaded, and that we are judicially bound to take notice of it.

NOTE. — See, to the same effect, the opinion of the judges upon appeal to the House of Lords in 12 Cl. & F. 787.

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*Ex parte* STERLING.

16 Ves. 258. 1809.

A PETITION was presented by the assignees, under a commission of bankruptcy, to have deeds and papers, belonging to the bankrupt, delivered up by an attorney; who claimed a lien upon them for his general bill.

An objection was taken on the ground, that these papers were delivered for the purpose of preparing a mortgage; and the lien was to be limited accordingly.

THE LORD CHANCELLOR. The general lien must prevail. Different papers are put into the hands of an attorney, as different occasions for furnishing them arise. In the ordinary case of lien I never heard of a question, upon what occasion a particular paper was put into his hands; but if in the general course of dealing the client from time to time hands papers to his attorney, and does not get them again, when the occasion that required them is at an end, the conclusion is, that they are left with the attorney upon the general account. If the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement: otherwise they are subject to the general lien, which the attorney has upon all papers in his hands.

NOTE. — In *Gottstein v. Harrington*, 25 Wash. 508, the court held that a statute declaring and confirming the common law as to the lien of attorneys "did not intend to confer an enforceable lien against papers in possession, as it provides no method for the enforcement of such lien. This, indeed, is but a recognition of the general law that a retaining lien may not be enforced, but may merely be used to embarrass the client, or, as some cases express it, to 'worry' him into the payment of the charges."

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RUSHFORTH v. HADFIELD.

East, 224. 1806.

THIS was an action of trover to recover the value of a quantity of cloth which the bankrupts had sent by the defendants as common carriers, who claimed a lien upon it for their general balance due to them as such carriers for other goods before carried by them for the

bankrupts. The plaintiffs had tendered the carriage price of the particular goods in dispute, and the sole question was, Whether the defendants, as common carriers, had a lien for their general balance. On the first trial a verdict was found for the defendants, which this court thought was not sustained by the evidence, and therefore they granted a new trial. The cause was again tried at the last assizes at York, before CHAMBRE, J., when the defendants' book-keepers in London, at Stamford, and at Huddersfield, swore to their practice to retain goods for their general balance, and particularized one instance in December, 1799, where an action was brought, which being referred, was decided on another point: a second in May, 1800, where there was no bankruptcy: a third in May, 1803, where the bankrupt's assignee demanded the goods, but afterwards paid the balance: a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened: and a sixth instance of the like sort as the last in 1804. In addition to these, Welch, a carrier from Manchester and Leeds, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance; and to two other instances of goods sent to Glasgow; one where the carriage of the particular goods was 3*l.* and the general balance 20*l.*; another where the carriage was a few shillings, and the general balance 8*l.*; in both instances bankruptcies intervened, and the assignees paid the general balance. Hanley, a Northallerton carrier, spoke to two instances of retainer of goods twelve and thirteen years ago till the individuals paid the general balance; but neither were bankrupts. The book-keeper of Pickford, a carrier from London to Liverpool, particularized an instance of retaining for the general balance in 1792, where the vendee became bankrupt; but there the vendor stopped *in transitu*, and he paid the general balance at the end of two months: a second similar instance, in the same year: a third instance in 1795, where the senders became bankrupts, and their general balance was paid by the vendees: a fourth in 1795, where the goods of an individual, not bankrupt, were detained several years; but no account how the matter was finally settled: and two other like instances in 1794 and 1795. And Clark, a Leicester carrier, also mentioned two instances, one in 1775, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from twenty to thirty years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting with the defendants in conformity to it; in which case they were to find for the defendants:

otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside in last Michaelmas term, as a verdict against all the evidence.

LORD ELLENBOROUGH, C.J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about ten or twelve years back, and several of them of very recent date. The question however results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them, it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is therefore to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances again were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence therefore is open to observation. If indeed there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted upon it? And they have in effect found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The carrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular

inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negating the lien claimed by the defendants on the score of general usage.

GROSE, J. This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law, that no such lien can exist except by the contract of the parties expressed or implied.

LAWRENCE, J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way; but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If then it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry therefore if it were found generally that they have no such lien as that now claimed upon the ground of general usage.

LE BLANC, J. This is a case where a jury might well be jealous of a general lien attempted to be set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party therefore who sets up such a claim ought to make out a very strong case. But upon weighing the evidence which was given at the trial, I do not think that this is a case in which the court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them.

*Rule discharged.*

*C. Liens on Chattels delivered without the Authority of the Owner.*

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ROBINSON v. WALTER.

3 Bulst. 269. 1616.

THE defendant kept a common inn. A stranger brought the plaintiff's horse to the inn, there set him for some time, and afterwards went away. The question was whether the defendant was justified in refusing to deliver the horse to the plaintiff, until the defendant was satisfied for his charges for keeping the horse.

MOUNTAGUE, Chief Justice. Where one is hired to serve, there he shall not wage his law, because compellable. *Communia hospitia* are compellable to receive guests and their horses; and so he is to answer for them which are brought thither; the custom of London is good and reasonable, how long to stay, not till he eats out more than his head; the innholder may sell him presently, and this is justifiable. Here in this case, the innkeeper said to the plaintiff, Prove the horse to be yours, pay for his meat, and you shall have him. This is no denial, nor yet any conversion, he claims no property at all; he only detains the horse, till he be satisfied for his meat, and so he may well do by the law; he may keep him till he be paid for his meat, because he is compellable at the first to receive him.

DODDERIDGE, Justice. One who hath no keeping for his horse, doth devise this way to send his man with him to an inn, and to let him stand there, and afterwards to come thither himself, and of the innkeeper to demand his horse, and upon his refusal, to bring his action upon the case; this is a fine trick for the plaintiff to have his horse kept, and to give the innkeeper nothing for the same; but instead of paying of him for his meat, to pay him with an action, which he hath no cause so to do, as this case here is, the innkeeper may well justify the keeping of his horse till he do pay him for his meat, which is all he desires to have.

HAUGHTON, Justice, differed in opinion. The party being the true owner of the horse, hath no other way to provide for himself but this. The innkeeper hath his proper remedy against him who brought and left the horse there for his meat, and for him thus to prejudice the owner of the horse, by the wrong of another, this will be very inconvenient.

CROKE, Justice. If a stranger takes my cattle, and puts them into the ground of another, he may well keep them till I pay him for their meat and hurt there done. If a man's horse be stolen, and brought unto an inn, or if a man lends his horse to one for a day, and he keeps him three or four days, the innkeeper here was in no fault at all. If

the horse was stolen and brought thither, he cannot charge the innkeeper with this, but he which brought him thither, and there left him. Here the innkeeper hath done no wrong at all, the owner is to satisfy him for his meat, because he was here compellable to receive him.

**MOUNTAGUE.** If a stranger takes the horse of another, and sets him up in an inn, if the horse was there stolen away, the party may have his remedy against the innkeeper.

If a man's servant carries his master's horse to an inn, and there leaves him, and he is stolen away; an action lieth here for the master, as well as for the servant, against the innkeeper.

**DODDERIDGE** agreed this to be so, if he knew him to be his servant; the owner is to pay for his meat, and it would be a very mischievous thing if it should be otherwise; for when a man hath lost his horse, he is to look for him, and when he hath found him in the inn, if he should not be enforced to pay for his meat, this would be a trick, to have his horse kept for nothing, and to have him brought by his servant to the inn. The owner hath a benefit, meat for his horse, and for the which he ought to pay.

**CURIA.** The pleading here is not good, therefore they did advise the party to plead to issue, and so to go to trial, and so judgment may then be given upon the event, but as the case here is; **CROKE**, **DODDERIDGE**, and **MOUNTAGUE**, clear of opinion for the defendant against the plaintiff.

**HAUGHTON** differed from them in opinion for the plaintiff.

And so upon this action here brought, and upon the demurrer to the defendant's plea, the opinion of the court was against the plaintiff.

**NOTE.** — In *Yorke v. Grenaugh*, 2 Ld. Raym. 866, an innkeeper asserted a lien on a horse delivered to him without the authority of the owner. In the report is the following passage: "And **HOLT**, Chief Justice, cited the case of the Exeter carrier; where A stole goods, and delivered them to the Exeter carrier, to be carried to Exeter, the right owner finding the goods in possession of the carrier, demanded them of him, upon which the carrier refused to deliver, without being paid for the carriage. The owner brought trover, and it was held, that he might justify detaining against the right owner for the carriage; for when A brought them to him, he was obliged to receive them and carry them; and therefore since the law compelled him to carry them, it will give him remedy for the premium due for the carriage. The same reason holds in this case."



## BROADWOOD v. GRANARA.

10 Exch. 417. 1854.

THIS was a case stated for the opinion of the court by consent of the plaintiffs and defendant, and by order of a judge.

The declaration stated that the defendant converted to his own use the plaintiffs' goods, that is to say, a boudoir grand pianoforte. The defendant pleaded, first, not guilty; secondly, that the goods were not the plaintiffs'. Upon which, issues were joined.

The plaintiffs are, and at the time of the alleged conversion were, in partnership as manufacturers of pianofortes, in Great Pulteney Street, London. The defendant was, and is, the proprietor of an inn or hotel, called the Hotel de l'Europe, in Leicester Place, Leicester Square.

In March, 1853, a Monsieur Hababier, a foreigner and professional pianist, went to reside at the defendant's hotel, and remained there, occupying apartments, and occasionally taking his meals in the house, for some months. On the 28th of March, Monsieur Hababier, then residing at the hotel, as before mentioned, went to the manufactory of the plaintiffs in Great Pulteney Street, and requested the use or loan of a grand pianoforte. It has been, and is, usual for the plaintiffs to lend pianofortes to musical artists without charge; and in compliance with this request a grand pianoforte was sent to the before-mentioned hotel for the use of Monsieur Hababier. This pianoforte remained at the hotel in possession of Monsieur Hababier, in his apartments, until the 9th of June following, when it was taken away and replaced by a boudoir grand pianoforte, also supplied by the plaintiffs without charge to Monsieur Hababier.

Monsieur Hababier remained at the hotel until the 27th of June, and during that time incurred a bill for the use of the apartments and for board, hire of carriages, and other accommodation, to a considerable amount. Some payments were made on account, but at the time of the demand and refusal hereinafter mentioned, there was a balance due from him to the defendant of 46*l.* 3*s.* 5*d.*, consisting in part of use of apartments, etc., after the 9th of June.

On the 27th of June, the plaintiffs' clerk applied to the defendant for the last-mentioned pianoforte, and requested that it might be delivered to him for the plaintiffs. He, at the same time, handed to the defendant a written authority from Monsieur Hababier to deliver it to the plaintiffs. The defendant declined to deliver up the pianoforte. On the following day, the clerk again went to the house of the defendant, taking with him a van and two porters, and again demanded the pianoforte. On this occasion, the defendant asked him if he had brought any money, and being answered in the negative, said, "Unless Messrs. Broadwood pay my bill for the rent of the apartments, I will not give up the piano."

It is admitted, for the purposes of this case, that the hotel of the defendant was, and is, an inn; and that the defendant was, and is, entitled to the rights of an innkeeper.

The defendant, at all times, knew the pianoforte in question was not the property of Monsieur Hababier, but that of the plaintiffs; and the plaintiffs at all times knew that the said Monsieur Hababier was stopping at an hotel. The balance due to the defendant from Monsieur Hababier is still unpaid.

The question for the opinion of the court is, whether, under the above circumstances, the plaintiffs are entitled to maintain the action. If the court shall be of opinion that the action is maintainable, the verdict is to be entered for the plaintiffs, with 100*l.* damages. If the court shall be of opinion that the defendant had a right to detain the pianoforte, then the verdict is to be entered for the defendant.

POLLOCK, C. B. — We are all of opinion that the lien claimed by the defendant cannot prevail. I need not go through the series of decisions referred to, or the propositions propounded at the bar, because the limited ground on which I think the plaintiffs entitled to judgment is this — that there is no case which decides that an innkeeper has a right of lien under such circumstances as these. This is the case of goods, not brought to the inn by a traveller as *his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that person. I shall not inquire, whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien.

PARKE, B. — I am of the same opinion. It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien. The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods which, in performance of his duty to the public, he is bound to receive. The obligation to receive depends on his public profession. If he has only a stable for a horse he is not bound to receive a carriage. There was no ground

whatever for saying that the defendant was under an obligation to receive this pianoforte.

ALDERSON, B. — I am of the same opinion.

PLATT, B. — The case of *Johnson v. Hill*, 3 Stark. 172, shews the principle of law which is applicable to the present case. If a person brings the horse of another to an inn, the innkeeper may detain it from the owner until its keep is paid. But if, as the jury found in *Johnson v. Hill*, the innkeeper knew that the person bringing the horse illegally got possession of it, and therefore had no right to pledge it for his debt, then the lien does not attach. Here the plaintiffs send a pianoforte to the room of the guest, and the innkeeper well knew that it was not the property of the guest, and that it was not competent for him to pledge it for a debt of his own. Then, how can it be said that any act of the plaintiffs gave the defendant a right to detain the pianoforte for his guest's debt? The plaintiffs might have taken it away the next minute. The case does not fall within the principles of law relating to the lien of innkeepers.

*Judgment for the plaintiffs.*

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ROBINS v. GRAY

[1895] 2 Q. B. 501.

APPEAL from the judgment of WILLS, J., in an action tried without a jury.

The action was brought to recover from the defendant, an innkeeper, certain sewing-machines, the property of the plaintiffs, which they alleged were wrongfully detained by the defendant.

The plaintiffs were a firm of dealers in sewing-machines and other articles. In 1894 they had in their employment as a commercial traveller one Green, who canvassed for orders and sold their goods upon commission. In April, 1894, Green, for the purposes of his business as such commercial traveller, went to stay at the defendant's hotel, taking with him sewing-machines, the property of his employers, for the purpose of selling them to customers in the neighbourhood. He remained there until the end of July. Whilst there the plaintiffs sent to him from time to time more sewing-machines for the same purpose. At the end of July Green left the hotel without paying his bill for board and lodging, and he left there some of the machines so sent. Before the defendant received into his hotel the machines so sent, and before Green had incurred his debt for board and lodging, the defendant had been expressly told by the plaintiffs that the machines were their property, and not the property of Green; but he received the goods into his hotel as Green's baggage. The defendant claimed a lien for the amount of Green's debt upon the machines left by him at the hotel.

On the above facts the learned judge gave judgment for the defendant.

The plaintiffs appealed.

LORD ESHER, M.R. I have no doubt about this case. I protest against being asked, upon some new discovery as to the law of innkeeper's lien, to disturb a well-known and very large business carried on in this country for centuries. The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers. Their rights and liabilities are dependent upon that, and that alone; they do not come under any other head of law. What is the liability of an innkeeper in this respect? If a traveller comes to an inn with goods which are his luggage — I do not say his personal luggage, but his luggage — the innkeeper by the law of the land is bound to take him and his luggage in. The innkeeper cannot discriminate and say that he will take in the traveller but not his luggage. If the traveller brought something exceptional which is not luggage — such as a tiger or a package of dynamite — the innkeeper might refuse to take it in; but the custom of the realm is that, unless there is some reason to the contrary in the exceptional character of the things brought, he must take in the traveller and his goods. He has not to inquire whether the goods are the property of the person who brings them or of some other person. If he does so inquire, the traveller may refuse to tell him, and may say, "What business is that of yours? I bring the goods here as my luggage, and I insist upon your taking them in"; or he may say, "They are not my property, but I bring them here as my luggage, and I insist upon your taking them in"; and then the innkeeper is bound by law to take them in. Again, suppose the things brought are such things as the innkeeper is not bound to take in, he may, as I have said, refuse to take them in although the traveller demands that they shall be taken in as his luggage; but if after that the innkeeper changes his mind and does take them in, then they are in the same position as goods properly offered to the innkeeper according to the custom of the realm. Then the innkeeper's liability is not that of a bailee or pledgee of goods; he is bound to keep them safely. It signifies not, so far as that obligation is concerned, if they are stolen by burglars, or by the servants of the inn, or by another guest; he is liable for not keeping them safely unless they are lost by the fault of the traveller himself. That is a tremendous liability: it is a liability fixed upon the innkeeper by the fact that he has taken the goods in; and by law he has a lien upon them for the expense of keeping them as well as for the cost of the food and entertainment of the traveller. By law that lien can be enforced, not only against the person who has brought the goods into the inn, but against the real and true owner of them. That has

been the law for two or three hundred years; but to-day some expressions used by judges, and some questions — immaterial, as it seems to me — which have been left to juries, are relied on to establish that if the innkeeper knows that the goods are not the goods of the person who brings them to the inn, he may refuse to take them in; or, if he does take them in, he has no lien upon them. One cannot help asking, What is his liability supposed to be if he does take in goods under such circumstances? It must be borne in mind that goods brought into an inn are not exclusively in the possession of the innkeeper; the person who brings them may deal with them: he may take them out of a box in a room or passage without the knowledge of the innkeeper, though the latter is bound to see that no one else interferes with them. Now, is there any decided case in which it has been held that, although goods have been brought to an inn as the luggage of the traveller and received as such by the innkeeper, he has no lien upon them if he knows that they are not the goods of the traveller? There is not one such case to be found in the books. It was said that *Broadwood v. Granara*, 10 Ex. 417, was such a case. But there the proposition, that if a guest brings goods into an inn as his luggage they must be treated as if they were his goods, was fully recognised. The judges held in that case that a piano, not brought to the inn by the guest as his luggage, but sent in by a tradesman for the guest to play upon during his stay at the inn, was not offered to, nor taken possession of by, the innkeeper under the custom of the realm as the luggage of the guest, and therefore that the piano was not subject to the innkeeper's lien. Whether we should have agreed with that decision is immaterial. The case was expressly decided on the ground that the law of innkeepers did not apply. It is, therefore, no authority in the case now before us, where, as the learned judge in the court below has found, the goods were brought to the inn as the goods of the traveller and accepted as his goods by the innkeeper. If we were to accede to the argument for the appellants we should be making a new law, and our decision would produce in very many cases great confusion and hardship. I am of opinion that an innkeeper is bound to take in goods with which a person who comes to the inn is travelling as his goods, unless they are of an exceptional character; that the innkeeper's lien attaches, and that the question of whose property the goods are, or of the innkeeper's knowledge as to whose property they are, is immaterial. This appeal should, therefore, be dismissed.

KAY, L.J. In this case the appellants bring their action for the detention of certain sewing-machines of which they are the owners. The defence is, "I am an innkeeper; the goods in question came into my possession as the goods of a guest at my inn, and I have a lien upon them for the unpaid bill of that guest." Replication, "You knew that they were not his goods; you had notice that they did not

belong to him, but that they belonged to us, the plaintiffs." The question is, whether that is a good replication. The facts are: The appellants' traveller went to the inn taking some sewing-machines with him, and stayed there. Whilst there other machines were sent to him by his employers, and those machines were received by the innkeeper, and were taken care of by him, and were in his possession. The traveller left without paying his bill for board and lodging at the inn. I agree with WILLS, J., that the fact that some of the machines were sent to the inn after the traveller had gone there does not make any difference; because the innkeeper accepted them as he had accepted the machines originally brought to the inn by the traveller — that is, as the goods of the traveller — I do not mean his property, because the innkeeper knew that they were the property, not of the traveller, but of his employers. Now, we have had an elaborate argument, and various cases have been cited in support of the appellants' case. We asked counsel if he knew of a single case in which it had been held that an innkeeper could refuse to take in goods of an ordinary description brought to his inn by a commercial traveller for sale in the neighbourhood. No case of that kind has been cited or could be found, although this business of commercial travellers has been carried on for a very great length of time, and so largely that there is scarcely an inn in England to which commercial travellers do not go with the goods of their employers. That fact is suggestive in considering the contention now put forward. Further, there is no case to be found in the books to shew that an innkeeper would not be liable in the ordinary way for the loss of such goods so brought to his inn by a commercial traveller, and so taken in by himself. It is, therefore, clear that, if a commercial traveller goes to an inn with goods as his luggage which are ordinary goods for sale of a commercial traveller, and the innkeeper takes him and his goods in, the innkeeper's liability in respect of those goods would be the same as in respect of the personal luggage of the traveller. That being undoubted, we have to consider whether the innkeeper's lien is defeated by reason of the fact that when he took the goods in he knew, or had had notice, that they were the property, not of the commercial traveller, but of his employers. The law is stated in *Robinson v. Walter*, 3 Bulstr. 269, by DODDERIDGE, J., when the case first came before him, thus: "This is a common inn, and the defendant a common innkeeper, and this his retainer here is grounded upon the general custom of the land: he is to receive all guests and horses that come to his inn: he is not bound to examine who is the true owner of the horse brought to his inn; he is bound, as he is an innkeeper, to receive them, and therefore there is very great reason for him to retain him, until he be satisfied for his meat which he hath eaten; and that the true owner of the horse cannot have him away, until he have satisfied the innkeeper for his meat." That is a distinct state-

ment that this law of an innkeeper's lien is founded on the general custom of the land, and that an innkeeper is not bound to inquire to whom the goods which a guest brings to the inn belong, but is bound to receive them.

The case of *Broadwood v. Granara*, 10 Ex. 417, was chiefly relied on for the appellants. There a guest staying at an inn went to a shopkeeper in the town and hired a piano, which was sent to him at the inn for the purpose of playing on it during his stay there, and the innkeeper knew that the piano was so hired for that purpose, and allowed it to be brought into his inn. The court held that he had no lien upon it; but the ground of the decision is stated as clearly as possible in the judgments. POLLOCK, C.B., said (at p. 422): "This is the case of goods, not brought to the inn by a traveller as *his goods*, either upon his coming to or whilst staying at the inn, but they are goods furnished for his temporary use by a third person, and known by the innkeeper to belong to that third person. I shall not inquire whether, if the pianoforte had belonged to the guest, the defendant would have had a lien on it. It is not necessary to decide that point, for the case finds that it was known to the defendant that the pianoforte was not the property of the guest, and that it was sent to him for a special purpose. Under these circumstances, I am clearly of opinion that the defendant has no lien." PARKE, B. (at p. 423) said: "It is not necessary to advert to the decisions on the subject of an innkeeper's lien, because this is not the case of *goods brought by a guest to an inn* in that sense in which the innkeeper has a lien upon them; but it is the case of goods sent to the guest for a particular purpose, and known by the innkeeper to be the property of another person. It therefore seems to me that there is no pretence for saying that the defendant has any lien." Then follow words which are sufficient to determine the case before us: "The principle on which an innkeeper's lien depends is, that he is bound to receive travellers and the goods which they bring with them to the inn. Then, inasmuch as the effect of such lien is to give him a right to keep the goods of one person for the debt of another, the lien cannot be claimed except in respect of goods, which, in performance of his duty to the public, he is bound to receive." An analogous case to that was put by the Master of the Rolls during the argument of the present case. Suppose a jeweller in the town sent, with the knowledge of the innkeeper, certain jewels to a guest at the inn on approval, and allowed them to remain in the inn for some days — could the innkeeper claim and enforce a lien upon those jewels? I should think he could not, because they were sent for a special temporary purpose, and the innkeeper knew it; they were, therefore, not sent as the goods — I do not mean as the property — of the guest; they were not goods which he was likely to take about with him as his luggage. But, in the case before us, the goods were received into the inn as the kind of goods with which the guest was

accustomed to travel in his employment as a commercial traveller; and they were the kind of goods which the innkeeper would be bound to receive without inquiring — and he had no right to inquire — to whom they belonged. If we were to hold that the innkeeper had no lien upon them we should be effecting a complete revolution in the custom of the land, in accordance with which an innkeeper, who receives into his inn commercial travellers with the goods of their employers which the travellers bring there in the course of their business, is accustomed to believe, and has a right to believe, that he has a lien upon those goods.

A. L. SMITH, L.J. A commercial traveler went in the course of business to an inn; and, according to the finding of WILLS, J., he took with him goods which “were of a kind which a commercial traveller would in the ordinary course carry about with him to the inns at which he put up as part of the ordinary apparatus of his calling, and which the innkeeper would consequently be bound to receive into his inn and to take care of while he was there.” The learned judge finds in effect that the goods in question were part of the commercial traveller’s baggage, and goods which the innkeeper was bound by the law of the land to take in, and to absolutely preserve as the goods of his guest. That obligation is imposed upon him by the custom of the realm. In consideration of that obligation there is given to him — also by the custom of the realm — a lien upon the goods for the value of the food and lodging supplied to the guest during the time he stays at the inn. I cannot do better than read what LOPES, L.J., said in *Gordon v. Silber*, 25 Q. B. D. 491, at pp. 492, 493: “The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title, this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title.” I agree with that; it is good law, and is not disputed in this case; nor can it be disputed, because it is settled by authority. But it is said that the law so stated does not apply if goods, brought to an inn as the goods and baggage of a commercial traveller, are not his property but the property of his employers, and that fact is known to the innkeeper when he takes the goods in. Counsel for the appellants was asked what case had decided that. He relied on *Broadwood v. Granara*, 10 Ex. 417, which, he said, decided that the innkeeper had no lien where goods were sent to an inn, and he knew that they were not the property of the person staying at the inn to whom they were sent. In my view the case did not decide that at all, because the piano was not sent to the inn as the guest’s luggage or baggage; he hired it in the



town, and it was sent for him to play upon whilst he stayed at the inn. The court held that it was not his baggage which the innkeeper by the law of the land was bound to receive. Here the sewing-machines were received as the baggage of the commercial traveller. The question whether he was able to pledge them or not has nothing to do with the matter; the rights and liabilities of the innkeeper depend upon the custom of the realm. Some expressions of judges were relied on to the effect that an innkeeper had a lien upon goods brought to his inn by a guest, if the innkeeper did not know that the goods were not the property of the guest, but were the property of some one else. There is no decision, however, that if he did know, his lien was gone. The illustration may be put of goods received by an innkeeper of which one half belonged to the guest who brought them, and the other half to some one else. Suppose the innkeeper received all the goods with knowledge of the fact: could it be said that he was under any different obligation with respect to the goods which were the guest's and those which were not; so that, as to one half, his obligation was to keep the goods safely and securely, and, as to the other, only to take due care? In my judgment, the contention made on behalf of the appellants fails, and I agree that this appeal should be dismissed.

*Appeal dismissed.*

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SINGER MANUFACTURING CO. v. LONDON  
RAILWAY CO.

[1894] 1 Q. B. 833.

APPEAL from the decision of the judge of the Southwark County Court.

The plaintiffs by an agreement let to one Woodman a sewing machine, Woodman undertaking to pay to them a rent of 1s. 6d. per week payable weekly in advance, and it was agreed that at any time during the hire Woodman might become the purchaser of the machine by payment of the price, and that in such case credit should be given for all payments previously made under the agreement. Unless and until a purchase was effected, the machine was to continue the sole property of the plaintiffs, and Woodman was to remain bailee only of it.

In May, 1893, Woodman deposited the sewing machine in the cloak room belonging to the defendants at Waterloo Station, and received a ticket on which was printed among other conditions, "Articles deposited in the cloak rooms for more than 48 hours will be charged 1d. extra for each package per diem for the first calendar month, and 2d. per week or part of a week for the second and third calendar months. . . . Articles left in the cloak rooms for twelve

months are liable to be sold, and the company will not hold itself responsible to account for the proceeds."

Woodman subsequently made default in the payment of the weekly rent, and in October, 1893, he forwarded the cloak-room ticket to the plaintiffs. The defendants refused to deliver the sewing machine to the plaintiffs until they were paid 4s., which was admitted to be the amount of their charges in accordance with the condition indorsed on the cloak-room ticket. The plaintiffs then brought this action to recover the machine, and the defendants counterclaimed for the 4s.

The county court judge held that the defendants had a lien on the sewing machine in respect of these charges, and gave judgment for them on claim and counterclaim. He, however, gave leave to appeal, and the plaintiffs appealed.

MATHEW, J. I think that this appeal must be dismissed.

The material facts are these. One Woodman, the hirer of a sewing machine, deposited it at the cloak room belonging to the defendants at Waterloo Station. The charges for which the defendants now claim a lien on the machine were incurred in respect of the deposit of the article there. The hirer, it would appear, after a time made up his mind not to release the article, and gave notice to the owners where it was. It was held by Woodman under a hire-purchase agreement, and, at the time this notice was given, a considerable amount of instalments remained unpaid. Thereupon the plaintiffs demanded the possession of the sewing machine from the defendants, and the defendants claimed a lien upon it for their charges for the time during which the article had remained in their cloak room. Now, it could not be disputed that the hirer was entitled, while he was in possession of this article, to carry it by train and to incur such charges in respect of it as a passenger by train does incur. Whatever the origin of the rule, it is not necessary to discuss now; but it is clear law that a carrier would have on the article so carried a lien for the charges incurred in respect of its carriage. The sole question now is whether the same principle applies to the charges incurred in respect of its safe custody in the cloak room.

The history of the cloak room at railway stations is supplied by the Railway and Canal Traffic Act, 1854. There it is enacted that a railway company shall afford reasonable facilities for receiving, forwarding, and delivering traffic. One of the most reasonable of such facilities is the cloak room at railway stations, which has been long established in accordance with that Act of Parliament. The cloak room at Waterloo Station existed under that Act of Parliament, and it is said the principle that applies to the contract of carriage applies to this cloak room, which is provided by the company as part of the reasonable facilities for the traffic on the line. It seems to me that that argument is a sound one, and that the same principle applies.

The lien which the defendants had as carriers they had also as owners of the cloak room, and they were entitled, in my opinion, to have payment of their charges in respect of the machine before delivery to the plaintiffs.

That was the opinion of the county court judge. I see no reason to differ from it, and the appeal must be dismissed.

COLLINS, J. I am of the same opinion. I think the sewing machine in this case must be taken to be deposited in the cloak room just in the same way and subject to the same rights as if it were entrusted to a carrier for the purpose of carriage. I think, that having regard to modern decisions and the rising standard of convenience to which railway companies are obliged to conform, the cloak room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage. The company are common carriers of passengers' luggage, and if they carried this sewing machine they would be common carriers of this sewing machine, and would have a lien upon it against all the world in respect of the cost of carrying it. I do not see why they should not equally have a lien for receiving it and warehousing it in their cloak room. The same principle lies at the root of both. They are under an obligation now to give reasonable facilities for the receipt and safe custody of baggage, and it was in the performance of that obligation that they received this sewing machine. Therefore, on that ground it seems to me the lien is good, not only against the person depositing it, but against the owner. I think in this case the lien may also be rested on another ground; and that is, that the person who deposited this machine was, as between himself and the owner of it, entitled to the possession of it at the time he deposited it. He was entitled to it under a contract of hire, which gave him the right to use it, I presume, for all reasonable purposes incident to such a contract, and among them, I take it, he acquired the right to take the machine with him if he travelled, and to deposit it in a cloak room if he required to do so. In the course of that reasonable user of the machine, and before the contract of bailment was determined, he gave rights to the railway company in respect of the custody of it. I think those rights must be good against the owners of the machine, who had not determined the hire-purchase agreement at the time that those rights were acquired by the railway company. If the owners subsequently determined that agreement, they must determine it subject to the rights which had been acquired, that is, subject to the lien of the defendants for their charges.

I think, therefore, that on both those grounds the judgment of the county court judge is right, and the appeal ought to be dismissed.

*Appeal dismissed; leave to appeal given.*

## ROBINSON v. BAKER.

5 Cush. (Mass.) 137. 1849.

THIS was an action of replevin, for six hundred barrels of flour, tried before DEWEY, J., and reported by him for the consideration of the whole court. The material facts are as follows: —

The plaintiff, in October, 1847, by his agent, Joseph B. Gardner, of Buffalo, in the State of New York, purchased six hundred barrels of flour, which the agent caused to be put on board a canal-boat at Black Rock, on the 23d of October, 1847, to be transported to Albany. The boat was owned by a company, known by the name of the Old Clinton line, engaged in the business of common carriers between Buffalo and Albany. On receiving the flour, the agent of the company executed and delivered to the plaintiff's agent duplicate bills of lading, by which the company undertook to deliver the flour to Witt, the agent of the Western railroad, at East Albany. One of the bills of lading was sent to Witt, and the other to the plaintiff, at Boston.

On the arrival of the flour at Albany, November 5th, 1847, Monteath and Company, the agents there of the Old Clinton line, called on Witt, and informed him that the six hundred barrels of flour had arrived, and asked him if he would take it off the boat that day. Witt said he would not, without mentioning any time when he would receive the flour; but only that the boat must take its turn. Boats arriving at East Albany, consigned to Witt, or to the Western railroad, were discharged in their turns; and in the months of October and November, 1847, there was a detention at East Albany, in unloading, of from one to three days.

The agents of the Old Clinton line at Albany thereupon shipped the flour to the city of New York, by a company known as the Albany and Canal line, engaged as common carriers in the transportation of merchandise between the city of New York and Albany, and received from the agents of the company \$433.08, as and for the freight of the flour from Black Rock to Albany, and requested the company to ship the flour from New York to Boston, for the plaintiff.

On the arrival of the flour at New York, Hoyt, the agent of the Albany and Canal line there, shipped the same for Boston on board the schooner *Lady Suffolk*, of which the defendant was master, consigned to Horace Scudder and Company, agents of the Albany and Canal line at Boston; and Hoyt at the same time remitted to Scudder and Company a bill of exchange, drawn by him, as agent, upon the plaintiff, payable to Scudder and Company, for \$494.33, which included the freight from Black Rock to Albany, and from Albany to New York, with instructions to Scudder and Company to deliver the flour to the plaintiff, on his paying or agreeing to pay the amount

of the said bill of exchange, and, in addition thereto, the freight upon the flour from New York to Boston.

On the arrival of the defendant's vessel at Boston with the flour, November 23d, 1847, the plaintiff demanded the same, and the defendant refused to deliver it, on the ground that he had a lien thereon for the freight. The plaintiff refused to pay the freight, and commenced this action of replevin to recover the flour.

FLETCHER, J. As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton line and the Albany and Canal line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is, whether if a common carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrongdoer, without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether if goods are stolen and delivered to a common carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner, until the carriage is paid.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of *York v. Grenaugh*, 2 Ld. Ray. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice HOLT cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them, and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. POWELL, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier, who receives goods from a wrongdoer or thief, may detain them against the true owner until the carriage is paid.

In the case of *King v. Richards*, 6 Whart. 418, the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years there was no direct adjudication upon this question except that referred to in *York v. Grenaugh* of the Exeter carrier. In 1843, there was a direct adjudication, upon the question now under consideration, in the supreme court of Michigan, in the case of *Fitch v. Newberry*, 1 Doug. 1. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier however was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle settled was, that if a common carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods or trover for their value. The case appears to have been very fully considered and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of *Buskirk v. Purin*, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendant's vessel. On the defendant's refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267, 275, it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner. These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property cannot be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrongdoer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage is first paid to him; and he may in all cases secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418, it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on general principles, the ruling in this case cannot be sustained, and that if a carrier receives goods, though innocently, from a wrongdoer, without the consent of the owner, express or implied, he cannot detain them against the true owner, until the freight or carriage is paid.

NOTE. — In *Fitch v. Newberry*, 1 Doug. (Mich.) 1, the court said (pp. 8, 10, 11): "If, as contended by the defendants, a carrier is bound to receive and carry all goods offered for transportation, without the right of enquiring into the title or authority of the person offering them, then clearly he should be entitled to a *lien*, even

against the owner, upon the goods, until he is paid for the labor he may bestow in their carriage. Let us now enquire whether such is the law. The doctrine is certainly opposed to all the analogies of the law, and it seems to me to every principle of common justice. . . . All the other cases, in which the general proposition is laid down that common carriers are bound to receive goods offered for carriage, are evidently based upon the supposition that the goods are there offered by their owners or their authorised agents; and that, if in any way they acquire possession of property without consent of the owner, express or implied, they, like all other persons, may be compelled to restore it to such owner, or pay him for its value. And that the doctrine of *caveat emptor* applies, with the same force, to that class of persons as to others, is manifest, I think, from an examination of authorities. The obligation of a common carrier to receive and carry all goods offered, is qualified by several conditions, which he has a right to insist upon before receiving them. 1. That the person offering the goods has authority to do so. 2. That a just compensation, or the usual price, be tendered for the carriage. And 3. That although the *owner*, or his agent, offer goods for carriage and tender payment for the freight in advance, still he is not bound to receive them, unless he have the requisite convenience to carry them. In an action brought against a carrier for refusing to receive and carry *goods*, would it not constitute a valid defence that the plaintiff had stolen them, although, at the time of offering, the carrier may not have known they had been stolen? In Story on Bail. § 582, it is laid down that a carrier is excused for *non-delivery* of goods to the consignee, when they are demanded, or taken from his possession, by some person having a superior title to the property. And, again, where the adverse title is made known to the carrier, if he is forbidden to deliver the goods to any other person, he acts at his peril; and if the adverse title is well founded and he resists it, he is liable to an action for the recovery of the goods. If, then, the owner could reclaim the goods in the hands of the carrier, *after* their delivery to him, and that would excuse a *non-delivery* to the depositor, it is clear that he would be justified in refusing to *receive* them from one having a wrongful possession, although at the time of such refusal he might not know the manner in which they had been obtained. So, a carrier is in all cases entitled to demand the price of carriage before he receives the goods, and, if not paid, he may refuse to take charge of them. Story on Bail. § 586; 5 Barn. & Ald. 353; 4 Id. 32; 3 Bos. & Pull. 48; and Whit. on Liens, 92. If, then, a common carrier may demand payment for carriage in advance, and if he may reject goods offered by a wrongdoer, or by one having no authority to do so, is he not bound to take care that the person from whom he receives them has authority to place them in his custody?"

The doctrine that a common carrier does not have a lien upon



chattels delivered to him without the authority of the owner is supported by *Hayes v. Campbell*, 63 Cal. 143; *Savannah Ry. Co. v. Talbot*, 123 Ga. 378; *Jones v. Boston & Albany R.R.Co.*, 63 Me. 188; *Stevens v. Boston Railroad Corporation*, 8 Gray (Mass.) 262; *Clark v. Lowell Railroad Company*, 9 Gray (Mass.) 231; *Gilson v. Gwinn*, 107 Mass. 126; *Corinth Engine Works v. Mississippi Railroad Company*, 95 Miss. 817; *Bassett v. Spofford*, 45 N.Y. 387 (see also *Collman v. Collins*, 2 Hall, 569); *Vaughan v. Providence R.R. Co.*, 13 R.I. 578, 579; *Owen v. Burlington Ry. Co.*, 11 S.D. 153. See, *contra*, *King v. Richards*, 6 Whart. (Pa.) 418, 423.

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COOK v. KANE.

13 Oreg. 482. 1886.

LORD, J. This suit was instituted by the plaintiff, as an innkeeper, to enforce a lien against a piano, put in his possession by the defendant as his guest, for a debt due for lodging and entertainment. By the facts stipulated, it is admitted that the relation of innkeeper and guest existed between the plaintiff and defendant when the plaintiff, at the request of the defendant, paid the freight charges on the piano, and took it into his custody; that the piano was in fact the property of a third person, who had consigned it to the defendant to sell on commission, but that the plaintiff did not know it was the property of such third person, but received it in his character as an innkeeper and as the property of his guest. Upon this state of facts, we are to inquire whether the piano is chargeable with an innkeeper's lien for board and lodging furnished his guest.

At common law, the liability of an innkeeper for the loss of the goods of his guest is special and peculiar, and like that of the common carrier, is founded on grounds of public policy. It must not, however, be confounded with that of a common carrier; the liabilities, though similar, are distinct. *Clark v. Burns*, 118 Mass. 275; Schouler on Bailments, 259. Whatever controversy may exist in the judicial mind as to the true measure of the innkeeper's responsibility, it cannot be denied that his liability for the loss of the goods of his guest is extraordinary and exceptional. Schouler on Bailments, 261, and notes; *Coggs v. Bernard*, 1 Smith's Lead. Cas., Am. Notes, 401. Compelled to afford entertainment to whomsoever may apply and behave with decency, the law, as an indemnity for the extraordinary liabilities which it imposes, has clothed the innkeeper with extraordinary privileges. It gives him, as a security for unpaid charges, a lien upon the property of his guest, and upon the goods put by the guest into his possession. Overton on Liens, 129. Nor is the lien confined to property only owned by the guest, but it will attach to the

property of third persons for whom the guest is bailee, provided only he received the property on the faith of the innkeeping relation. Schouler on Bailments, 292; *Calye's Case*, 1 Smith's Lead. Cas. 247; *Manning v. Hollenbeck*, 27 Wis. 202. But the lien will not attach if the innkeeper knew the property taken in his custody was not owned by his guest, nor had any right to deposit it as bailee or otherwise, except perhaps some proper charge incurred against the specific chattel.

In *Broadwood v. Granara*, 10 Exch. 417, the innkeeper knew that the piano sent to the guest did not belong to him, and did not receive it as part of the *guest's goods*; and it was on that ground alone he was held not entitled to his lien. But in *Threfall v. Borwick*, L. R. 7 Q. B. 210, where the innkeeper had received the piano as part of the goods of his guest, it was held he had a lien upon it. MILLER, J., said: "When, having accommodation, he has received the guest with his goods, and thereby has become liable for their safe custody, it would be hard if he was not to have a lien upon them. And under such circumstances, the lien must be held to extend to goods which he might possibly have refused to receive." LUSK, J., said: "I am of the same opinion. The innkeeper's lien is not restricted to such things as a traveling guest brings with him in journeying; the contrary has been laid down long ago. It extends to all goods the guest brings with him and the innkeeper receives as his. If he has this lien as against the guest, the cases have established beyond all doubt that he has the same right as against the real owner of the article, if it has been brought to the inn by the guest as owner." To the same effect, QUAIN, J., said: "There is no authority for the proposition that the lien of the innkeeper only extends to goods which a traveler may be ordinarily expected to bring with him. . . . The liability, as shown by the old cases, extends to all things brought to the inn as the property of the guest and so received, even a chest of charters or obligations; and why not a pianoforte? If, therefore, the innkeeper be liable for the loss, it seems to follow he must also have a lien upon them. And if he has a lien upon them as against the guest, the two cases cited (and there are more) show that if the thing be brought by the guest as owner, and the landlord takes it in thinking it is the guest's own, he has the same rights against the stranger, the real owner, as against the guest." Upon appeal from the decision of this case, in *Threfall v. Borwick*, L. R. 10 Q. B. 210, it was held, affirming the decision, that whether the defendant, as innkeeper, was bound to take in the piano or not, having done so, he had a lien upon it. Although there are certain *dicta* not necessary to the decision in *Broadwood v. Granara*, 10 Exch. 417, to the effect that the innkeeper was not bound to receive the piano, yet the real ground of the decision was based on the fact that the innkeeper knew that the piano sent to his guest was the property of a third person, and did not, therefore, receive it as

part of his guest's goods, so the right to subject the piano to his lien was denied; but *e converso*, if he had not known the piano was the property of a third person, and had received it as the property of his guest, would not his lien have attached? It is not material whether the innkeeper is bound to receive such property or not, although it is said the liability may be well extended, according to the advanced usages of society; yet if he does receive it as the property of his guest, and thereby becomes liable for it, he must be entitled to his lien. *Threfall v. Borwick, supra.*

Whenever, by virtue of the relation of innkeeper and guest, the law imposes this extraordinary responsibility for the goods of the guest, it gives the innkeeper a corresponding security upon the goods put by the guest into his possession. It is true that the piano was shipped to the defendant in his name, but he brought it to the inn as his property, or at least it was brought there at his request and upon his order, and put in the custody and possession of the plaintiff as the property of his guest. It is admitted that the plaintiff received it as an innkeeper, and safely kept it as the property of his guest; nor is it doubted but what he would have been liable for its loss; and in such case, it is difficult to perceive upon what principle of law or justice he can be denied his lien. The judgment must be affirmed.

WALDO, C.J., concurring.

THAYER, J. (dissenting) . . . Upon the main question in the case, there is some doubt in view of the authorities upon the subject. Though upon a common-sense view there would not seem to be any. That the man Kane could pledge the appellant's piano for his own hotel bill, or in any way subject it to the payment thereof, would shock all sense of property right. The respondent's counsel, however, have cited numerous cases where such a lien has attached to the property of a third person, and I have no doubt but that such lien will in many cases attach to the property taken by the guest to the inn at which he obtains accommodations, though he be not the owner of it. But in all such cases, it seems to me the property must derive some special benefit, or else the owner must have intrusted it to a party under circumstances from which he could reasonably have concluded that the party would become the guest of an inn, and take the property with him there as his own; and I do not think the rules should extend further than this. In the case under consideration, it does not appear that the appellant ever knew that Kane was stopping at a hotel. He sent the piano to him at Baker City, to sell upon commission. It does not appear that the respondent furnished the entertainment upon the credit of the piano, or upon the supposition that it belonged to Kane. The latter might, and so far as I can see would, have continued a guest at the hotel the same whether the piano had been sent or not. It is not a case, as I view it, where the owner of the property has clothed another with

the *indicia* of ownership, and a third person been deceived thereby into purchasing it, or giving credit upon the faith of such indication. It was purely a business transaction. The appellant was attempting to make sale of his property, and sent it to Kane for that purpose. The latter had no authority in the premises, except to exercise the special power conferred, and it does not appear but that the respondent had full knowledge of the facts, as the appellant alleged he did in his answer. I am inclined to believe that the burden of proof was upon the respondent to establish that he supposed the piano to belong to Kane, and that he entertained him upon the faith that such was the fact, before he could claim a lien upon it for the hotel bill. The property of one man should not be taken for the debt of another against the former's consent, unless he has done some act or neglected some duty creating the liability. A party cannot be deprived of his ownership to property to satisfy the claim of another, unless he has in some form obligated himself to submit to it. He must have agreed to it in terms, or have done some act directly or remotely authorizing it. I do not think that the pleadings and agreed facts in this case establish that the respondent had any lien upon the piano for the hotel bill against Kane, or for anything beyond the sum advanced by the respondent for the freight and transportation of it, unless it be for its storage; but the instrument has doubtless been used sufficiently to offset any sum for storage, and the appellant duly tendered the amount advanced as freight and transportation.

I think the decree should be reversed as to the appellant.

NOTE. — The English doctrine, protecting the innkeeper when the goods are delivered to him without the authority of the owner, was followed in *Black v. Brennan*, 5 Dana (Ky.) 310, decided in 1837.

In 1843 it was decided in *Fitch v. Newberry*, 1 Doug. (Mich.) 1, that a common carrier did not have a lien upon chattels delivered to him without the authority of the owner. In this case the court said (p. 9): "There is an obvious ground of distinction between the cases of *carrying goods* by a common carrier, and the *furnishing keeping* for a horse by an innkeeper. In the latter case, it is equally for the *benefit* of the owner to have his horse fed by the innkeeper, in whose custody he is placed, whether left by a thief or by himself or agent; in either case, food is necessary for the preservation of his horse, and the innkeeper confers a benefit upon the owner by feeding him. But can it be said that a carrier confers a benefit on the owner of goods, by carrying them to a place, where, perhaps, he never designed and does not wish them to go? Or, as in this case, is the owner of goods benefited by having them taken and transported by *one* transportation line, at their own price, when he had already hired and paid *another* to carry them at a *less* price? This distinction does not, how-

ever, at all affect the determination of the case before us; we place it entirely upon other grounds."

Since 1843 there have been some decisions in support of the English doctrine in addition to the principal case. *Jones v. Morrill*, 42 Barb. (N.Y.) 623; *Singer Mfg. Co. v. Flennigan*, 7 Penn. Co. Ct. Rep. 45. And there have been numerous statements by the courts that the English doctrine is law. *Singer Mfg. Co. v. Miller*, 52 Minn. 516; *Waters v. Gerard*, 189 N.Y. 302 (earlier New York cases in which such statements were also made are collected in the opinion); *Corington v. Newberger*, 99 N.C. 523; *McGhee v. Edwards*, 87 Tenn. 506. See, also, *Alword v. Davenport*, 43 Vt. 30. And the standard text-writers state that the English doctrine is law in this country.

The student should deliberate as to whether there should be one rule for the common carrier, and another rule for the innkeeper.

No one would question the soundness of the decisions holding that, where the owner entrusts goods to an agent, contemplating that the goods will be received by innkeepers as part of his luggage, and they are so received, the innkeeper has a lien upon the goods for the charges against the agent. Thus, of the samples with which a traveling salesman is entrusted. See *Polk v. Melenbacker*, 136 Mich. 611; *Smith v. Keyes*, 2 T. & C. (N.Y.) 650; *Manning v. Hollenbeck*, 27 Wis. 202.

For the rule under the Georgia Code see *Domestic Sewing Machine Co. v. Watters*, 50 Ga. 573.

*D. Pledges.*

## COGGS v. BERNARD.

2 Ld. Raym. 909. 1703.

HOLT, Chief Justice. . . . When goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor, . . . this is called in Latin *vadium*, and in English a pawn or pledge.

## LUCKETTS v. TOWNSEND.

3 Tex. 119. 1848.

MR. JUSTICE WHEELER. . . . What are the respective rights of the parties under this contract? And upon this point, it is insisted for the defendants in error, that upon the failure of the plaintiffs to pay the debt at the time stipulated, the right of property, by the law of the contract considered either as a pledge or a mortgage, became absolute in Townsend: at all events, that the stipulation in the contract to that effect, is valid and must be adhered to.

It is clear, says Story (Bailments, s. 346), by the common law, that in cases of pledge, if a stipulated time is fixed for the payment of the debt, and the debt is not paid at the time, the absolute property does not pass to the pawnee; and this doctrine is as old as the time of Glanville. 2 Glanville, Lib. 10, ch. 6; 2 Caines, Cas. in Error, 200; Yelv. 178.

Kent asserts the same as having been the doctrine of the common law; and he adds — "the pawnee was obliged to have recourse to process of law to sell the pledge; and until that was done, the pawnor was entitled to redeem." 2 Kent, Com., 581; 2 Story's Eq., s. 1032.

But the English law now is, that when the debt is due, the pawnee has the election of two remedies. He may have a judicial sale under a decree of foreclosure; or he may sell without judicial process, upon giving reasonable notice to the debtor. For the pawnee is not now bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land. 2 Kent's Comm., 581. But without any bill to redeem, the creditor on a pledge or mortgage of chattels may sell at auction, on giving reasonable opportunity to the debtor to redeem, and apprising him of the time and place of sale. 4 Kent's Comm., 139; 2 Story, Eq., s. 1031.

The notice to the party in such cases is, however, indispensable.

1 Brown. Pa., 176; 2 Caines, Cas. Err., 200; 2 Story, Eq., 1033, n. 4, 3d edit. And the creditor (says Kent) will be held at his peril, to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale. 2 Kent's Comm., 583.

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## NOTE.

If the owner of chattels bails them, with intent that the bailee shall perform some service for the bailor respecting such chattels, and the bailee has the right to hold such chattels until sums due to him from the bailor are paid, the bailee is properly said to have a lien upon such chattels.

If the owner of chattels bails them, with intent that the bailee shall hold them until sums due to him from the bailor are paid (or other stipulated acts are performed by the bailor), the primary purpose of the bailment being to give security, the bailee is properly said to have a pledge of such chattels.

## CHAPTER II.

## LOSS BY SURRENDER OF POSSESSION.

## SEEBAUM v. HANDY.

46 Ohio, 560. 1889.

THE plaintiff below was the keeper of a feed-stable in the city of Cincinnati. The owner of a horse, who lived out of the city, was in the habit of leaving it with the plaintiff, when in the city, to be fed and cared for as long as suited his convenience; when called for, the horse would be delivered to the owner, and not returned, except at such intervals as suited the owner's convenience when again in the city. The plaintiff kept an account in which the owner was charged with the feed and care of the horse from time to time, as it was left with him. On or about the 12th of November, 1884, the horse was called for and delivered to the owner, as usual; the charges for feed and care then amounted to over a hundred dollars. Shortly afterward the owner was killed by being thrown from his buggy. And some time after that, the horse was driven to the city by a brother of the deceased and left at another feed stable, from which it was replevied by the plaintiff in an action against certain children of the deceased, who claimed to be the owners of the horse.

MINSHALL, C.J. Whether the instructions of the court to the jury stated the law applicable to the case made by the tendency of the proof, depends upon the nature and character of the lien given by sections 3212 and 3213, Rev. Stats., to a person who furnishes food and care for any "horse" by virtue of an agreement with the owner, to secure the payment of the same.

These sections are as follows: —

"Sec. 3212. A person who feeds or furnishes food and care for any horse, mare, foal, filly, gelding, mule, or ass, by virtue of any contract or agreement with the owner thereof, shall have a lien therefor, to secure the payment of the same, upon such animal."

"Sec. 3213. A person feeding or furnishing food and care for any horse, mare, foal, filly, gelding, mule, or ass, shall retain such animal for the period of ten days, at the expiration of which time, if the owner does not satisfy such lien, he may sell such animal at public auction, after giving the owner ten days' notice in a newspaper of general circulation in the county where the services were rendered;



and after satisfying the lien and costs that may accrue, any residue remaining shall be paid to the owner."

It seems to us very clear upon a view of these sections, that the intention of the legislature was, in enacting them, to give to the person furnishing such food and care a lien upon the animal as a security for the food furnished and care bestowed, with the incidents of a lien at common law in analogous cases. The first section gives the "lien," and the next one provides the mode of maintaining and enforcing it: The "person" shall "retain" the animal for ten days, and if, at the expiration of that time, the owner does not satisfy the lien, he may, on giving the requisite notice, sell it at public auction.

The nature and incidents of a common-law lien of this kind are well settled: It is a right to retain property until certain claims against it are satisfied; and possession is not only essential to its creation, but also to its continuance. Where the party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien. 2 Kent, Com. 638; Smith's Mercantile Law, 697; *Sweet v. Pym*, 1 East, 4; *Lickbarrow v. Mason*, 6 East, 21; *Hammond v. Barclay*, 2 East, 227; *Jordan v. James*, 5 Ohio R. 89, 98. In *McFarland v. Wheeler*, 26 Wend. 473, it is said, that "the very definition of a lien as the right to retain, indicates that it must cease when the possession is relinquished. This principle, so clearly founded in reason and so congruous to public utility and the convenience of trade, is supported by the uniform testimony of the decisions."

The right to sell the animal upon notice and apply the proceeds to satisfying the lien, does not affect its classification with similar common-law liens; it only gives a plain and simple remedy for enforcing the lien.

The evidence tended to show, and the charge of the court was applicable to, a case where the owner of a horse temporarily leaves it with the owner of a feed-stable to be fed and cared for; there is no definite arrangement as to time; it may be for less or more than a day; this depends upon the convenience of the owner who resides out of the city; when he wishes to return home, the horse is delivered to him, and the feed and care is charged to him in an account by the keeper. There is no express agreement at any time that the horse is to be returned. Now how, under these circumstances, it can be inferred, as the court charged the jury, that there is an implied contract on the part of the owner to return the horse, we are unable to see. The owner is, for the time, simply a customer of this particular feed-stable. The keeper may expect that when the owner again comes to the city he will again patronize him by sending his horse to his stable. But when this may be, he can neither rightfully demand to know, or expect to be informed. How would the owner, as a matter of law, violate any agreement for which damages could be recov-

ered, if he should, in the meantime, conclude to change his patronage and never return the horse. If it were otherwise, then it might be inferred that every customer of a store is under an implied contract to continue to deal with it. If he were in debt for goods previously sold, he might be under a moral obligation not to withdraw his custom until he had discharged what he owed, but there would be no legal obligation to that effect, arising from the circumstances.

The lien provided by this statute does not arise upon contract. True, the feed must be furnished under an agreement with the owner, but where this has been done the statute creates the lien in favor of the party furnishing it, irrespective of any agreement therefor to that effect. The lien given is a right to retain the property, that is its possession, as a security for the debt, and if this right is not insisted on when the horse is called for, the owner can not be said to violate any agreement in not afterward returning it; for he has no notice of an intention on the part of the keeper to assert a lien, when the property is voluntarily delivered to him; and, therefore, any supposed agreement to return could only relate to a thing of which he has no notice, and which, in fact, has no existence.

Therefore, in a case like the one to which the court applied its charge, the person furnishing the feed and bestowing the care must, if he would assert a lien on the animal therefor, do so by retaining its possession when called for by the owner, unless his charges are paid. If he do not, and voluntarily deliver the animal to the owner, he must be held to have waived his right to assert a lien under the statute, and to be satisfied with the personal liability of the owner for the charges. Such is the rule in common-law liens based on possession, and we see no reason why the rule should not apply here as well as there. It is more in harmony with the general policy of our statutes "which always strive to secure public registration when possession is not given and retained, and which expressly provide for such registration when they in terms create a lien not depending on possession." HOLMES, J., in *Burton v. Frye*, 139 Mass. 126, 130. See also the following cases: *Perkins v. Boardman*, 14 Gray, 481; *Papinsau v. Wontworth*, 136 Mass. 543; *Forth v. Simpson*, 66 Eng. Com. Law, 680.

What should be the rule in cases where the animal is placed by the owner with a person to be fed and cared for, not temporarily—the horse being ordinarily kept at home or somewhere else by the owner—but, permanently for some time either definite or indefinite, presents a different question. In such case where the owner is allowed to use it, its voluntary delivery to him for such purpose might be said to imply a contract to return the animal, and a failure to do so would be such a fraud as to estop the owner from setting up that the lien had been lost by such voluntary delivery. But this is not the case before us, and we express no definite opinion upon it at this time.

We have examined the cases cited by counsel for the plaintiff in error, but fail to find that they give any considerable support to his view of the case.

The case of *Young v. Kimball*, 23 Penn. St. 195, is simply to the effect that where the owner forcibly or clandestinely obtains possession of the subject of the lien, the lienor's right is not impaired by such deprivation of the possession. *Munson v. Porter*, 63 Ia. 453, rightly holds that demanding more than is due, will not entitle the owner to replevin the property without paying what is due. And *Eckland v. Donahue*, 9 Daly, 214, holds that replevin of the property cannot be had by bringing it before the defendant had time to make out his bill and give notice of his intention to perfect a lien, as required by statute.

The cases of *Caldwell v. Tutt*, 10 Lea (Tenn.) 258, and of *Smith v. Marden*, 60 N.H. 509, would tend to support the case where animals are, for the time being, permanently left with a person to be fed and cared for, with the right in the owner to use them. In such cases it is held that the lien is not thereby affected as against a creditor of the owner. The possession of the animal by the owner under such circumstances is not regarded as terminating the bailment, the possession being constructively that of the bailee, and under an implied contract to return the animal as soon as the use is at an end. This seems somewhat plausible, but whether sound or not, we do not, for the reasons before stated, now determine.

*Judgment affirmed.*

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ALLEN v. SMITH.

12 C. B. (N.S.) 638. 1862.

THE cause was tried before BYLES, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows:— On the 15th of March, 1861, one Thomas Burrowes, who was a stud-groom and trainer, and who had been long known to the defendant, came to the defendant's inn, the Wheatsheaf, at Westbury, in the county of Wilts, with the horse Nimrod, on his way to the meet of the Wiltshire hounds at that place. After staying there a short time to refresh and bait his horse, he departed, but returned that evening, and slept at the Wheatsheaf. On the following morning, a groom in Burrowes's employ arrived at the inn with the other horse, Magenta; and Burrowes and the groom remained there with the two horses, with the exception of certain intervals of absence when they went with the horses to run at races in various parts of the country, down to the 11th of October. Besides these occasional absences, the horses were taken out daily for exercise on the downs.

ERLE, C.J. It is clear that these horses were brought to the Wheat-sheaf and there received by the defendant in his character of inn-keeper receiving a guest with his horses and servant; and that Burrowes and his man came within the description of "transeuntes" in the old writ which has been referred to. They came to the inn and were entertained there as "travellers": and the contract they commenced with must be presumed to continue until a new contract is shown to have been entered into. I see no evidence of any new contract. It is urged on the part of the plaintiff, that, although they may at first have been received as ordinary guests, after staying there a considerable number of days the character of guest was changed into that of lodger. No precedent has been cited to warrant that: and I must confess I do not see any reason for it. It seems to me that the circumstance of the horses having been allowed to go out in the ordinary way of a guest riding or driving out and intending to return, cannot have the effect of defeating the innkeeper's lien. The intention to return was strongly indicated by Burrowes's going out on each occasion without as it would appear asking for his bill.

[The defendant was held to have a lien on the horses for all his charges.]

NOTE. — Cf. *Forth v. Simpson*, 13 Q. B. 680.

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### VINAL v. SPOFFORD.

139 Mass. 126. 1885.

REPLEVIN of one horse, one grocery wagon, one open buggy, one express harness, and one buggy harness. Writ returnable to the Municipal Court of the city of Boston. That court entered judgment for the plaintiff for all the articles replevied except the horse, with damages and costs; and also entered judgment for the defendant for a return of the horse, and for damages and costs. The plaintiff appealed to the Superior Court from the latter judgment. Trial in that court, before BRIGHAM, C.J., who allowed a bill of exceptions, in substance as follows:

The defendant contended that he had a right, under the plaintiff's appeal, to try the question of the title to the wagon and the harnesses; but the judge ruled that he had no such right, and excluded evidence offered in regard to such title.

As to the horse, there was evidence tending to prove the following facts: Howard Vinal, the father of the plaintiff, during the two years prior to January 4, 1883, had owned a stock of groceries, and also the horse described in the plaintiff's declaration, which he had used in connection with his business of a grocer, at a shop in Boston, and

during seven months of this period had hired the keeping of said horse at the livery stable of the defendant. On January 4, 1883, Howard Vinal, being embarrassed in his business, executed and delivered a bill of sale of all the stock, furniture, and fixtures owned by him in said shop, together with said horse, to the plaintiff, and on the same day delivered the horse to the plaintiff, in consideration of the plaintiff's promissory note, payable on demand, for a certain sum, which was received by Howard Vinal, on payment of said note, and applied by him to carry into effect a composition with most of his creditors.

At the time of this composition, Howard Vinal requested the defendant to become a party thereto, but the defendant, whose claim against Howard Vinal for keeping the horse was from \$160 to \$190, refused so to do unless the full amount of his claim was paid; and he did not become a party to said composition during the keeping of the horse at the defendant's livery stable, before and after the transaction of sale between Howard Vinal and the plaintiff. After January 4, 1883, the shop was conducted with the same sign upon it as before; the horse was used in the business of said shop as before, and Howard Vinal conducted, for a salary of \$12 per week, the business of the shop, with the same clerks as before, while the plaintiff carried on the business of his shoe shop on another street.

The daily custom in the matter of the use and keeping of said horse was this: it was taken by Howard Vinal, or by some person acting under his direction, from the defendant's livery stable early in the morning, and used at the shop in its business until noon, then was taken to the defendant's stable to be baited; afterwards it was taken to the shop, and there used until evening, when it was returned to the defendant's livery stable, and was there kept until the following morning. While the horse was at the shop, according to the daily custom, on January 4, 1883, he was delivered to the plaintiff, under the transaction of sale; and, without notice thereof to the defendant of said transaction, at the close of that day was returned to the defendant's livery stable, and kept and used as previously under said custom, until replevied in this action.

The contract for the keeping of the horse between Howard Vinal and the defendant was, that for its keeping the defendant should be paid one half in cash and one half in groceries from the shop, and before the replevin the defendant, or some person by his order, had received groceries to the amount of \$50 in part payment for the keeping. After January 4, 1883, and about ten days before the replevin, the defendant demanded money from Howard Vinal, or flour or sugar from the shop, in part payment of the sum due for the keeping of the horse. Howard promised to send flour for that purpose, but failed to do so, and in explanation told the defendant that the stock of his shop, horse, etc. had been sold by him to the plaintiff; and

thereupon the defendant sent a person in his employ to take the horse, then at the shop in use as previously, and remove the same to his livery stable; and the horse was then and there removed, and remained in the defendant's livery stable until replevied in this action.

The plaintiff subsequently at said livery stable, asked the defendant to give him a statement of how much he, the plaintiff, owed for the keeping of the horse, offering to pay the same; but the defendant refused to state any claim for the keeping of the horse against the plaintiff, declaring that the plaintiff owed him nothing for that keeping, but that his father, Howard Vinal, owed for that keeping; and thereupon this action was brought.

The foregoing is a statement of all the facts of which there was any evidence at the trial.

The defendant requested the judge to rule, that he had the right to take and to hold the horse, by virtue of his lien as a livery stable keeper, for the keeping of the horse, and that this lien was not impaired or interrupted by allowing the owner of the horse to use the same in his business of a grocer; that the facts and circumstances in evidence of his allowing the owner of said horse the use of the same did not, in law, constitute a waiver of such lien; and that the sale of the horse by Howard Vinal to the plaintiff, without the knowledge of the defendant until after he had taken the horse to his stable, could not operate to defeat the lien which he asserted for the keeping of the horse to the time of the sale and afterwards.

The judge refused to rule as requested by the defendant, and ruled that, upon the facts and circumstances in evidence, the defendant could not maintain the lien claimed by him against the plaintiff's right to the possession of the horse under his purchase of the same from Howard Vinal, or under his retaking of the horse at said shop upon obtaining knowledge of the purchase.

The defendant contended that the sale of the horse by Howard Vinal to the plaintiff was not an actual sale, but a colorable one, and fraudulent; and that, on the morning of the day when the defendant retook the horse, the defendant had been induced to permit the horse to be taken from his possession and from his livery stable by the fraudulent promise of Howard Vinal to send to the defendant flour from his shop, in part payment for the money then due for the keeping of said horse.

The jury found specially, upon questions submitted to them, that the sale of the horse by said Howard Vinal to the plaintiff was a valid sale, made in good faith and for a valuable consideration, and that the horse was not obtained from the livery stable of the defendant by false and fraudulent representations; and returned a general verdict for the plaintiff. The defendant alleged exceptions.

HOLMES, J. 1. When replevin is brought for a number of chat-

tels, some of which belong to the plaintiff and others to the defendant, although all are declared for in one count, the case is dealt with as if there were two counts, and each party was entitled to prevail upon one. *Seymour v. Billings*, 12 Wend. 285; *Williams v. Beede*, 15 N.H. 483. Each party is an actor, and each may have a judgment and legal costs, as happened in this case. *Powell v. Hinsdale*, 5 Mass. 343. These judgments are distinct, and it follows that an appeal by one party only from the judgment against him does not reopen the judgment in his favor. Pub. Sts., c. 154, §§ 39, 43; c. 155, § 28. Justice and analogy lead to the same result. See *Downing v. Coyne*, 121 Mass. 347; *Whiting v. Cochran*, 9 Mass. 532; *May v. Gates*, 137 Mass. 389; *M'Donough v. Dannery*, 3 Dall. 188, 198.

2. The jury have found that the plaintiff bought the horse in good faith and for a valuable consideration, and that it was not obtained from the defendant's stable by fraud. On the bill of exceptions we must assume that the previous owner of the horse rightfully took it from the defendant's custody and delivered it to the plaintiff. Such a transaction would divest a common-law lien. *Perkins v. Boardman*, 14 Gray, 481. We are of opinion that it equally divested that which the defendant had previously acquired under the Pub. Sts., c. 192, § 32 (St. 1878, c. 208). That statute creates a lien in cases where the common law has not recognized one. *Goodrich v. Willard*, 7 Gray, 183. But it gives no intimation that it uses the word "lien" in any different sense from that which is known to the common law. On the contrary, it in terms supposes that the animals in question have been placed in the care, that is to say, in the possession, of the party to whom the lien is given. The provisions for sale would seem to imply the same thing. To admit that it was intended to create a tacit hypothecation, like that enforced from necessity, but within narrow limits, in the admiralty, would be to go in the face of the whole policy of our statutes, which always strive to secure public registration when possession is not given and retained, and which expressly provide for such registration when they in terms create a lien not depending on possession. It follows from what we have said, that, even if the defendant had had a lien for the keeping of the horse after the sale, or whatever might be the rule when the animal was voluntarily restored to his possession, he lost it by allowing the plaintiff to take possession, and could not revive his right by seizing the horse. *Thompson v. Dolliver*, 132 Mass. 103. *Walker v. Staples*, 5 Allen, 34. *Papineau v. Wentworth*, 136 Mass. 543.      *Exceptions overruled.*

NOTE. — See, *accord*, *Fishell v. Morris*, 57 Conn. 547.

## CALDWELL v. TUTT.

10 Lea (Tenn.) 258. 1882.

FREEMAN, J., delivered the opinion of the court.

This case is as follows: Plaintiffs are livery stable keepers in the city of Clarksville. Mr. Mumford had placed his horse in the stable to be kept by the owners of the stable. He was in the habit of taking said horse from the stable occasionally for a ride, by and with the consent of the keepers of the stable. While riding him on one of these occasions, the horse was levied on by defendant, a constable, by virtue of an execution against the owner.

The question submitted to the court was, whether the livery stable keepers, whose bill for board of the horse was unpaid, had a lien on the horse for its payment, or the execution levy was superior to it? The circuit judge decided in favor of the defendant, and that on these facts no lien existed at the time of the levy, from which there is an appeal in error to this court.

The case turns mainly on sections 1993 *a* and 1993 *c* of the Code. The first provides: "Whenever any horse or other animal is received to pasture for a consideration, the former shall have a lien upon the animal for his proper charges, the same as the inn-keeper's lien at common law." The latter section is: "Livery stable keepers shall be entitled to the same lien provided for in section 1 of this act, on all stock received by them for board and feed, until all reasonable charges are paid."

The question then is, would an inn-keeper be entitled to his lien under the facts in this case? for the livery stable keeper has such a lien as the inn-keeper, until all reasonable charges are paid. The nature of the business, and necessary implications arising from the character of the undertaking or contract is to be taken into consideration, in arriving at the proper result.

The right of the inn-keeper is to detain or hold the horse till the price of his provender is paid: 3 Parsons, 249. Mr. Parsons adds: "What shows the spirit and principle of the rule, if he permit his guest or horse to depart on credit, he loses his lien, and can never arrest it after for that debt if the guest come again."

Take the nature of this contract, and its surroundings, and apply this rule in its spirit, and we have the solution of the question.

The party puts his horse to board at a livery stable in his own town. He, as owner, takes his horse out temporarily for a ride, it may be of a morning or an evening for exercising himself or horse, or both. The inn-keeper permits this — as was fairly implied in the nature of the contract. It certainly cannot be maintained, that he thereby intends to permit the party to depart with the horse, and credit him for the board; on the contrary, it is well understood that



the possession will in a short time be restored. The horse is not intended to be allowed to depart from his custody so as to end the bailment, but only a temporary user of the owner to be allowed. In a word, neither party thought of terminating the contract — or of the one taking and the other yielding possession, so as to give an individual credit alone for the board, and release thereby the lien of the livery man.

This being the fair meaning of the contract, and of the acts of the parties, it would seem unquestionable, that as against Mumford, the livery keeper would have still retained his lien, and if so his creditor must take his shoes, and can only take his property *cum onere*, as the owner himself held it at the time of seizure. It would have been a fraud on the part of Mumford, had he assented to what had been done, terminated the bailment, and released the lien. His creditor can stand no higher.

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### REEVES v. CAPPER.

5 Bing. N. C. 136. 1838.

WILSON was captain of a ship owned by Messrs. Capper. Wilson borrowed £50 from them, on the security of a chronometer, and Messrs. Capper consented that he should take the chronometer on the ship for use during a voyage about to be begun, and Wilson so took it. One of the questions in the case was whether Messrs. Capper had thereby lost their rights as pledgees of the chronometer.

TINDAL, C.J. We agree entirely with the doctrine laid down in *Ryall v. Rolle*, 1 Atk. 165, that in the case of a simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge: but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were, that "they would allow him the use of it for the voyage:" words that gave him no interest in the chronometer, but only a licence or permission to use it, for a limited time, whilst he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper; just as the possession of plate by a butler is the possession of the master; and the delivery over to the plaintiff was, as between Captain Wilson and the defendants a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself. We therefore think the property belonged to the de-

fendants, and that the rule must be made absolute for entering the verdict for the defendants.

*Rule absolute.*

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MOORS v. READING.

167 Mass. 322. 1897.

REPLEVIN of a quantity of iron. Trial in the Superior Court, before BLODGETT, J., who ruled that the action could not be maintained; directed the jury to return a verdict for the defendants; and, at the request of the parties, reported the case for the determination of this court. The facts appear in the opinion.

ALLEN, J. The question in this case is whether there was any evidence for the jury that the plaintiffs took and retained possession so as to give them a valid title to the goods replevied. If they were mortgagees, their title would not be valid unless the mortgaged property was delivered to and retained by them, no record of the mortgages having been made. St. 1883, c. 73, § 2. If, however, they were pledgees, their title would also fail unless the property was delivered to and retained by them. So that it makes no difference in the determination of the case whether they were mortgagees or pledgees. *Blanchard v. Cooke*, 144 Mass. 207, 225.

The facts upon which the decision must depend are not now in dispute. Those which were proved, or which the plaintiffs' evidence tended to prove, may be summed up as follows.

One Houdlette was a dealer in iron, carrying a stock of goods in his store in Boston. In 1889 he borrowed money of the plaintiffs, which has never been repaid, and which the plaintiffs sought to secure in the following manner. Houdlette executed to the plaintiffs a general collateral agreement, so called, setting forth that all the merchandise transferred or to be thereafter transferred by him to them should be held only as security for his present or future indebtedness to them. He also from time to time, usually about once a month, executed to them a bill of sale of goods in his store. In some instances, but not always, upon receiving the bills of sale, they executed and delivered to him a special instrument of defeasance. These bills of sale were intended to cover all of the stock of goods in store from time to time, and did so cover it, except so far as new goods may have come in between the dates of two transactions, or as goods may have been released on orders, as hereinafter stated. Soon after the date of each bill of sale, the plaintiffs took possession by going to Houdlette's store, where statements were made by or in behalf of Houdlette that possession of the goods was given, and on behalf of the plaintiffs that possession was taken, by touching some of them, by appointing Houdlette's bookkeeper as agent of the plaintiffs to

take and hold possession of the goods for them, and by his acceptance of such agency. From time to time, as new bills of sale were received, the plaintiffs gave written orders to the bookkeeper to deliver to Houdlette portions of the goods included in former bills of sale. These orders were usually for round amounts, as called for by Houdlette's bookkeeper, being about the same in amount as the amounts of the new bills of sale; the amount being fixed by what the bookkeeper thought would be sufficient to cover the deliveries by Houdlette for the next month. The quantities in these orders were expressed in gross, as, for example, 75,000 pounds sheet plate iron and steel, 50,000 pounds angle iron, 200 kegs rivets. It was not intended to make sales of goods in excess of the amounts covered by these orders; but Houdlette made sales from all the goods in store, without regard to whether they had or had not been released by the plaintiffs, and this was permitted by the bookkeeper. Whenever the bookkeeper thought the amount of an order had been fully drawn, he would get a new one. No setting apart or separation of the goods covered by these orders was made; and new goods as they came in were mingled with the old, and there was nothing to distinguish them. Sales were made from the general stock of goods on hand, without discrimination; and the proceeds of the sales went to Houdlette. The bookkeeper was paid by Houdlette, and the plaintiffs did not pay or agree to pay him anything. Since the plaintiffs did not take possession on the day of the date of each bill of sale, there were usually some goods in the store which had come in between the date of the bill of sale and the day of taking possession, and which therefore were not covered by the bills of sale. No attempt was made to keep such goods separate. The above methods were pursued for nearly four years, at the end of which time Houdlette went into insolvency, and his assignees took possession of the goods.

If it be assumed that there was from time to time a sufficient taking of possession by the plaintiffs at the outset, the facts effectually negative the plaintiffs' view that there was any such retention of possession by them as to meet the requirements of the law. The obvious purpose of the statutory provision as to unrecorded mortgages, and of the rule of law as to the retention of possession by pledgees, is to prevent mortgagors or pledgors, by means of their possession of the property, from misleading people into the belief that they are its real owners. Accordingly the rule is general that, if mortgagors whose mortgages are unrecorded and pledgors are allowed to remain in possession of the mortgaged or pledged property, the mortgagees or pledgees will lose their lien. Possession or control of the property may be given to a mortgagor or pledgor for certain special purposes, without producing this effect: e.g. to make sale thereof for the sole benefit of the mortgagee or pledgee, or to keep

the property specifically for him for a time as his bailee or agent. There are numerous cases in which the question has arisen and been determined whether, under certain particular facts, the lien of a mortgagee or pledgee has been lost by reason of permitting the mortgagor or pledgor to be in possession of the property. *Kellogg v. Thompson*, 142 Mass. 76; *Moors v. Wyman*, 146 Mass. 60; *Thacher v. Moors*, 134 Mass. 156; *Thompson v. Dolliver*, 132 Mass. 103; *Thayer v. Dwight*, 104 Mass. 254; *Wright v. Tellow*, 99 Mass. 397; *Carpenter v. Snelling*, 97 Mass. 452; *Walker v. Staples*, 5 Allen, 34; *Way v. Davidson*, 12 Gray, 465; *Casey v. Cavaroc*, 96 U.S. 467; *Bank of Leavenworth v. Hunt*, 11 Wall. 391; *Steele v. Benham*, 84 N.Y. 634; *Button v. Rathbone*, 126 N.Y. 187; *Doyle v. Stevens*, 4 Mich. 86; *First National Bank of Stanton v. Summers*, 75 Mich. 107; *Menzies v. Dodd*, 19 Wis. 343; *Hage v. Campbell*, 78 Wis. 572; *Swiggett v. Dodson*, 38 Kans. 702; *Brunswick v. McClay*, 7 Neb. 137; *Pickard v. Marriage*, L. R. 1 Ex. D. 364; *Northwestern Bank v. Poynter*, [1895] A. C. 56. No one of these cases presents facts exactly like those now before us. But the rule to be deduced from them, which is applicable to the present case, appears to be clear. The plaintiffs appointed Houdlette's bookkeeper as their agent, so that there was no apparent change of possession. The goods which were at any time covered by the bills of sale were not set apart, and kept separate and free from intermixture with other goods not covered by the bills of sale. Whenever new goods were bought by Houdlette, they were added to the general stock on hand. Whenever the plaintiffs gave orders for the delivery or release of goods to Houdlette in order to enable him to make current sales, no separation was made of the goods embraced in such orders. The arrangement was made with the obvious purpose, or at any rate with the effect, of enabling Houdlette to carry on his business in the usual manner and without exciting suspicion; and there never was a day, so far as appears, when he might not have sold any particular piece or parcel of goods in his store without violating his understanding with the plaintiffs. From month to month, the plaintiffs signed orders for the release of goods in gross amounts from their lien, and of such quantities as would probably be sufficient to supply Houdlette's customers; and new orders of the same kind were signed as often as was necessary. There was no attempt to keep distinct and separate any specific portions of the stock of goods, as those which were subject to the plaintiffs' lien. This was the habitual and universal method adopted by the plaintiffs or by their agent.

This course of business is inconsistent with the view that the plaintiffs retained possession of any specific part of the goods. There was at best a confusion and intermixture of mortgaged with unmortgaged, or of pledged with unpledged goods, so that the two classes were indistinguishable, and this was done by the permission or

through the neglect of the plaintiffs or of their agent. The plaintiffs no longer retained the sole possession of the mortgaged goods. They either lost the possession entirely, or were merely tenants in common with Houdlette. *Ryder v. Hathaway*, 21 Pick. 298; *Forbes v. Fitchburg Railroad*, 133 Mass. 154, 160; 2 Kent, Com. 365, note, and cases cited; Story, Bailm. § 40; *Willard v. Rice*, 11 Met. 493; *Adams v. Wildes*, 107 Mass. 123; *Stearns v. Herrick*, 132 Mass. 114; *The Idaho*, 93 U.S. 575.

Upon the undisputed facts, the plaintiffs failed to retain such possession as the law requires in order to maintain their lien. To hold otherwise would enable parties to practice the very frauds which the statute as to unrecorded mortgages of personal property, and the rule of law as to the duty of pledgees to retain possession of the pledged property, seek to prevent.

The title of the defendants as assignees in insolvency of Houdlette must accordingly prevail. *Bingham v. Jordan*, 1 Allen, 373; *Low v. Welch*, 139 Mass. 33; *Blanchard v. Cooke*, 144 Mass. 207, 218, 226; *Casey v. Cavaroc*, 96 U. S. 467.

*Judgment on the verdict for the defendants.*

### CHAPTER III. ASSIGNABILITY.

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#### RUGGLES v. WALKER.

34 Vt. 468. 1861.

THE plaintiff's declaration contained counts in trespass and trover for taking and converting four tons of starch. Plea not guilty, and trial by jury at the December term, 1859, POLAND, J., presiding.

The plaintiff gave evidence tending to prove the following facts: In March, 1859, Daniel Whipple owned a starch factory in Lyndon, and that the defendant owned a quantity of potatoes in said factory. Whipple had failed and all his property had been attached, and he was desirous to make an arrangement so that he could have the avails of his personal labor for his own use. Accordingly he made a contract with the defendant to manufacture his potatoes into starch, for which the defendant was to pay him ten dollars per ton in advance.

Whipple commenced working the potatoes, and when he had finished three or four tons and put the same into casks and had several tons finished except putting the starch into casks, he applied to the defendant to pay him for what he had finished, and told the defendant he feared he would be trustee and he should lose his earnings. This was on Saturday, April 3. The defendant said he could not pay him for he was going to Boston, and on the next Monday he did go to Boston.

On the following Thursday, Whipple applied to the plaintiff to advance him the amount of his lien on the starch, and the plaintiff then let Whipple have one hundred dollars. At the same time Whipple delivered to the plaintiff eight casks of the starch, being about two tons, and on the following Monday, Whipple having finished the starch, the plaintiff paid him the balance due him for manufacturing the starch, making in all the sum of one hundred and sixty-seven dollars and eighty-one cents, which was conceded to be the amount due for manufacturing the starch. At this time Whipple delivered to the plaintiff four more casks of starch to hold as security for the payment of the price of manufacturing. The whole of these twelve casks of starch were moved by the plaintiff to a barn a few rods from the factory and marked with the plaintiff's name. The plaintiff notified the defendant that he had purchased Whipple's claim on the starch,

and that he could have it by paying what he had paid Whipple on the starch. It was conceded that the twelve casks contained about three tons of starch worth about sixty dollars per ton. It was conceded that on the day that the plaintiff took the last four casks of starch as above stated, the defendant took away all the starch from the factory, and also the twelve casks so delivered to the plaintiff without paying the price for manufacturing.

The defendant's evidence tended to contradict the plaintiff's in several particulars, but is not material to be stated in order to present the legal questions raised on the trial.

The defendant's counsel claimed and requested the court to charge the jury —

1st, That under the contract between Whipple and the defendant, Whipple had no valid lien on the starch for the price of manufacturing the same.

2d, That if he had, he could not transfer the same to the plaintiff, so as to enable him rightfully to hold the starch against the defendant.

3d, The plaintiff could only recover for the lien on the three tons of starch in his possession, at the rate of ten dollars per ton, and not for the price of manufacturing the whole.

But the court declined so to charge the jury, but did charge them that Whipple had a lien on the starch for the price of manufacturing; that he could transfer the same to the plaintiff with a portion of the starch, so as to give the plaintiff a lien upon the same, and that if the defendant had notice of the transfer to the plaintiff and took away the starch without paying or offering to pay the price, the plaintiff would be entitled to recover the whole price of manufacturing.

The defendant excepted to the refusal to charge as requested, and to so much of the charge as is stated above.

KELLOGG, J. The first question in this case is, whether Whipple, the plaintiff's assignor, had any lien on the property which is the subject of the action, for the price of manufacturing it; and the second, whether if he had a lien, it was of such a character as to enable him to transfer it with the property by assignment to the plaintiff, so that the plaintiff could rightfully hold the property against the defendant. It is conceded that the general property in the starch manufactured by Whipple was in the defendant.

I. A lien is a right to retain in one's possession another's property until some demand due to the person retaining has been satisfied. *Hammond v. Barclay*, 2 East, 235. It is a settled principle that where a party has, in the way of his trade or occupation, bestowed his money, labor, or skill upon a chattel, in the alteration and improvement of its properties, or for the purpose of imparting an additional value to it, he has a lien upon it for a fair and reasonable remuneration, or for the contract price, if the price has been fixed by agree-

ment; and this, though the chattel be delivered to him in different parcels, and at different times, if the work to be done under the agreement be entire. *Chase v. Westmore*, 5 Maule and S. 180. This is the ordinary lien of manufacturers, workmen, and artificers. Whipple was therefore entitled to this lien for the starch manufactured by him for the defendant; and although the contract called for the payment of the price of manufacturing the starch in advance, yet we think that the neglect or refusal of the defendant to make such payment should not affect the right of lien. The mere existence of a special agreement will not, of itself, exclude that right except in cases where the terms of the agreement are inconsistent with it. In *McFarland v. Wheeler*, 26 Wend. 467, it was expressed as the opinion of the court that when goods or other articles subject to a particular lien are delivered in part, those retained may be held to secure the payment for all the labor, skill, or expense laid out upon the whole under one and the same contract between the same parties, thus constituting one debt; and the case of *Blake v. Nicholson*, 3 Maule and S. 168, is alike in principle.

II. The more important question is, whether Whipple's lien was of such a character as would enable him to transfer it with the property by assignment to the plaintiff. The rule, as generally stated by text writers, is that the right of lien is a personal right which cannot be parted with, and that a person who has a lien can not sell his right to another, nor can he transfer the property over which the lien extends, without losing his right, unless the property has been pledged to secure the payment of money advanced, with an express or implied power of sale. 2 Kent's Comm., 642; Addison on Contracts, 1155. It is said by BULLER, J., in *Lickbarrow v. Mason*, 6 East, 27, *in notis*, that he who has a lien only on goods has no right to sell or dispose of them, but only to retain them until the original price be paid; and the same profound jurist says, in *Daubigny v. Duval*, 5 D. & E. 604, that "a lien is a personal right, and can not be transferred to another." An innkeeper who has a lien on the horse of his guest for his keeping has no right to sell the horse except by the custom of London. *Jones v. Pearle*, 1 Str. 556; *The case of an Hostler*, Yelv. 67. In *Holly v. Huggeford*, 8 Pick. 73, the lien of a factor was held to be a personal privilege which could not be set up by any other person in defence of an action by the principal. The case of *Doane v. Russell*, 3 Gray, 382, fully recognizes the rule that the right of lien is a personal right to detain in contra-distinction to an interest in the property, and that if a party parts with the article by a pledge, sale or otherwise, he loses his lien. In that case, the question was whether the defendant who held a mechanic's lien on a wagon for the payment of his work and materials, had a right, upon notice, and in case the bill was not paid in a reasonable time, to sell the wagon to enforce the lien; and it was held that he had no such right, and that a



party having a lien only, without a power of sale superadded by agreement, can not lawfully sell the chattel for his reimbursement. SHAW, C.J., in his opinion in the case, distinguishes between a lien for work and materials, as given by what was anciently called the custom of the realm, or now the general law, and an express pawn or pledge of goods by the owner as collateral security for a loan of money, and says that "in the latter case, it is now held that when the debt has become due, and remains unpaid, the creditor, after a reasonable time, may sell the pledge; but otherwise when there is a mere lien, as in the case of mechanics, innholders, and others by customs." The distinction is this, that a lien, when given by law, is merely a right to retain or keep possession of property until payment; but a pledge of property by way of security for a debt is a lien with a power of sale superadded. In *Lovett v. Brown*, 40 N. H. 511, it is held that a mechanic's or manufacturer's lien is neither a *jus ad rem*, nor a *jus in re*, but a simple right of retainer, personal to the party in whom it exists, and not assignable or attachable as personal property, or a chose in action, of the person entitled to it. The lien in such cases is a mere passive lien or right of retainer, and, although the retention of the property may be attended with expense, and may be of no benefit to either party, these considerations will not change the nature of the lien or the rights conferred by it. It is of the same nature as the lien of an attorney or solicitor on papers for his costs, which is a mere personal right, and one that can not be actively enforced, as the papers can not be sold or transferred, but can only be held as a security. *Bozon v. Bolland*, 4 Myl. & Cr. 354. (18 Eng. Ch., S.C.) Property held by a party in right of a lien can not form the subject-matter of a sale by, or be taken on execution against, the lienholder. *Legg v. Evans*, 6 M. & W. 36; *Holly v. Huggefords*, *ubi supra*; *Kittredge v. Sumner*, 11 Pick. 50.

We regard it as well established by the authorities referred to that Whipple's right of lien was, while the property remained in his possession, a personal privilege which he could not sell or transfer except with the consent of the defendant, who was the general owner of the property; that possession was essential not only to the creation, but also to the continuance, of the lien; and that when Whipple parted with his dominion over the property, and suffered its locality to be changed, so as to put it out of his power to surrender it on demand to the general owner, on payment or tender of the price of manufacturing it, his right of lien was determined and forfeited. The transfer by Whipple of his right of lien to the plaintiff was consequently inoperative, and passed no right or interest in the property to the plaintiff. A different view of the law of the case having been taken by the county court in the instructions given to the jury, the judgment of that court in favor of the plaintiff is reversed, and a new trial granted.

## NASH v. MOSHER.

19 Wend. (N.Y.) 431. 1838.

A LIENHOLDER consented that a third person should take the wagon upon which he had a lien, upon becoming accountable for the amount due him. One of the questions was whether this person, having taken the wagon and thereafter paid such amount to the lienholder, could assert the lien as against the owner of the wagon.

COWEN, J. Of the general right of a mechanic to sell his debt and transfer the property held in *lien* as security, I perceive there was formerly considerable doubt. This and all other like liens raised by law for the benefit of trade and manufactures, as I take it, stand on the same footing in point of assignability with the *factor's lien*. Of this BULLER, J., said in *Daubigny v. Duval*, 6 T. R. 604, 606, "a lien is a personal right, and cannot be assigned to another." That, however, was not held so plain, but that when *M'Combie v. Davies*, 7 East, 5, came to be heard, LORD ELLENBOROUGH put it that the factor could not *tortiously* pledge the goods, though he might continue the lien by delivering them over to another, as his servant, to hold the possession in his own name. His lordship evidently thinks that he cannot go further. He concludes at first that a parting with the possession to another assignee, would be a waiver, or forfeiture of the lien. Such he assumes to have been the notion of BULLER, J., in *Daubigny v. Duval*; for he says LORD KENYON, who dissented there, seemed afterwards fully to have acceded to the doctrine, when he says in *Sweet v. Pym*, 1 East, 4, "The right of lien has never been carried farther than while the goods continue in possession of the party claiming it." I admit that the court in *M'Combie v. Davies* finally seem to agree that if the goods and lien be passed over, as a mere security to another for a debt, the lien might thus be preserved. 7 East 7, 8; and see 7 Cowen, 680; 11 Wend. 79. If it may be passed over as a security, of course it may be sold, provided the parties, vendor and vendee, do not seek to pass a greater right than the lien, but both act in strict subordination to the claim of the principal owner. I confess I see nothing in this repugnant to the interests of commerce; and it accords with what is certainly the general rule, that all rights of property, whether they be in possession, in action or retainer, are assignable. Indeed it now stands admitted, "that a factor has a right to assign or deliver over the goods as a pledge or security to the extent of his lien thereon, if he avowedly confines the assignment or pledge to that; and does not exceed his interest." Story on Bailm. 216, and the cases there cited, note 2; 2 Kent's Com. 489 of the 1st, and 626 of the 2d ed.; *Urquhart v. McIver*, 4 Johns. R. 103, 115, 116, 117. *Urquhart v. McIver* seems to settle the question in favor of the position as laid down by the two learned

commentators. There a ship was assigned by the factor as a security to the extent of his liens. That *per se* was held not to be tortious; but a valid transaction. Bates did nothing more in this case; and I incline to think that the transaction, as far as he acted, was a valid one.

NOTE. — In *Hoover v. Epler*, 52 Pa. 522, a groom had been employed to care for a horse. He caused a farrier to shoe the horse and paid his bill. He was held entitled to enforce the farrier's lien.

In *M'Combie v. Davies*, 7 East 5, LORD ELLENBOROUGH said (p. 7) that if a lienholder, intending to give a security to another to the extent of his lien, "delivers over the actual possession of the goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him, in [such] case he might preserve the lien."

The doctrine that the benefit of a lien may be given by the lienholder to another person is supported by *Davis v. National Surety Co.*, 139 Cal. 223; *De Witt v. Prescott*, 51 Mich. 298, 304; *Rodgers v. Grothe*, 58 Pa. 414, 419; *Davis v. Bigler*, 62 Pa. 242, 251; *Bean v. Bolton*, 3 Phila. (Pa.) 87, 89; *Gurney v. James*, 19 U. C. Q. B. 156. See also *Buckner v. M'Iroy*, 31 Ark. 631; *Murphy v. Adams*, 71 Me. 113, 119.

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### GOSS v. EMERSON.

23 N.H. 38. 1851.

TROVER, for four promissory notes, given by one Hatch to the plaintiff, on the 8th of April, 1846, for fifty dollars each, and payable to him, or order, in one, two, three and four years. The writ was dated September 29th, 1848; and was served on the same day, but not till after the transactions hereinafter set forth.

Plea, the general issue.

It appeared in evidence that on the 29th of March, 1848, the plaintiff gave to the defendant the following note, or accountable paper, to wit:

"Hartford, March 29th, 1848.

"Received of D. B. Emerson, the sum of two hundred and three dollars and seventy-eight cents, which I promise to pay to him or order, in six months from date, with interest. When the above sum of two hundred and three dollars and seventy-eight cents is paid, four notes of fifty dollars each, signed by W. Hatch, running to L. Goss, are to be given up to him.

(Signed,)

LEVI GOSS."

And on the same day the defendant gave to the plaintiff the following paper:

"Hartford, March 29th, 1848.

"Received of Levi Goss, four notes of fifty dollars each, signed by Wm. Hatch, which I agree to return to him when he pays a note of two hundred and three dollars and seventy-eight cents, signed this day, running to me.

(Signed,)

D. B. EMERSON."

It was admitted that the note referred to in the last receipt was the above paper signed by said Goss. It appeared that when the above papers were signed by the parties, the four notes were put into the hands of the defendant, that they were negotiable, and of the description set forth in the plaintiff's writ, and that the plaintiff did not indorse them, when he passed them to the defendant.

On the next day, March 30th, the defendant went to Hatch with the notes, two or three times, and desired him to promise to pay the same to him. Hatch declined, but said he would pay them to whomsoever the holder might be when they fell due. On the next day, or day after, the defendant passed the note or accountable paper, signed by the plaintiff, to one Kingsbury, who paid him the amount due on the same, and also at the same time delivered to him the four notes, with the understanding between himself and Kingsbury, that he should hold the notes as security for the \$203.78, in the same manner as Emerson had. Within three or four days thereafter, Kingsbury went to Hatch and arranged with him to take up the four notes and give four others of the same amount and dates, payable to Kingsbury or bearer. This was done, and Hatch then took up the notes for which this suit was instituted, and canceled the same, and gave four, payable to Kingsbury or bearer. These last notes Kingsbury immediately passed to one Tenney and received the cash therefor. The transactions of Kingsbury with Hatch and Tenney were not known to Emerson till after they were completed.

The plaintiff did not know of the transfer of the notes to Kingsbury, nor of any thing which Emerson, Kingsbury, Tenney or Hatch did till long afterwards, nor did he in any way, at any time, assent to what was done.

PERLEY, J. The note given by the plaintiff to the defendant, March 29, 1848, was negotiable. It was an absolute undertaking to pay \$203.78, to the plaintiff or order, in six months with interest. A contract, by the same writing and on the same consideration, to pay a sum of money and also to deliver goods, is not a negotiable note; because, the contract being entire, and not negotiable as to the goods, it cannot be negotiable as to the money. The note in the case merely recites the consideration; the undertaking is to pay absolutely in money, and in money alone.

The four notes, for which this suit was brought, were delivered to the plaintiff, in pledge, to secure payment of the plaintiff's note. By

the written agreement of the defendant, the plaintiff was to have these notes back when he paid his note of \$203.78. The plaintiff was to pay his note; that is to say, he was to pay \$203.78, and interest, to the defendant or his indorsee, according to the tenor of the note. The plaintiff, by the obvious construction of the contract, was to make payment to the holder of the note, before he could entitle himself to a return of the securities, pledged for its payment. The defendant did not agree to restore the pledge, when the plaintiff should pay him \$203.78 and interest, but when he should pay the note; and payment of the money to the defendant, after the note was indorsed, would not pay the note. The note could only be paid to the holder. The tender, therefore, to be available should have been made to the holder; but the tender was made in this case to the defendant, after he had indorsed and transferred the note, and when he had no right to the money due on it.

It is, therefore, unnecessary to consider whether the tender stated in this case would have been sufficient, if it had been made to the proper party.

The general property in the four notes pledged, remained in the plaintiff; but the defendant took them in pawn for the payment of his debt, and this gave him an interest in them, which, whether his debt were negotiable or not, he could lawfully transfer to a third person. He might assign all his interest in the pledge; or he might assign it conditionally, to secure payment of his own debt; or he might deliver it to a bailee, without consideration, to hold as a deposit for him. The transfer of the notes in any one of these ways would be a legal disposition of them, authorized by the nature of the defendant's interest as pawnee.

In *Jarvis v. Rogers*, 15 Mass. Rep. 408, JACKSON, J., delivering the opinion of the court, says: "The pawnee may deliver the goods to a stranger without consideration; or he may sell or assign all his interest absolutely; or he may assign it conditionally by way of pawn; without in either case destroying the acquired lien, or giving the owner the right to reclaim them on any better terms than he could have done before such delivery or assignment." *Sir John Ratcliffe v. Davis*, Yelverton, 178; *Demainbry v. Metcalfe*, 2 Vernon, 690; *Bush v. Lyon*, 9 Cowen, 56; *Bullard v. Billings*, 2 Vermont, 309, and *Story on Bailments*, 219, go to establish the same general doctrine.

Where the pledge has been merely bailed to a third person, and the whole interest remains in the original pawnee, payment or tender may be made to him, and after tender to the pawnee, the bailee on demand will be liable in trover. *Ratcliffe v. Davis*, Yelverton, 178.

But where the interest is assigned with the thing pledged, tender should be made to the assignee. *Demainbry v. Metcalfe*, 2 Vernon, 690.

*Murray v. Burling*, cited for the plaintiff from 10 Johnson, 172, does not appear to be in point. In that case the note was entrusted to the defendant to raise money and pay the plaintiff's debt; instead of that, the defendant transferred the note in payment of his own debt, in direct violation of his trust and contrary to his express undertaking.

The legal nature of the defendant's interest in the four notes, gave him the right to transfer them to Kingsbury with the negotiable debt, which they were pledged to secure. Of course he cannot be charged with a wrongful conversion, by assigning the notes to Kingsbury.

If the act of Kingsbury in delivering up the notes to the maker was a conversion, it was not the act of the defendant. He had legally parted with his possession and all his interest. Kingsbury was substituted in his place as the lawful holder of the securities, and the defendant cannot be charged with the wrongful act of another, over which he had no control. A mortgagee might as well be held liable for the destruction of the mortgaged property, after he had parted with all his interest by a valid assignment.

NOTE. — See, *accord*, *Bank of Forsyth v. Davis*, 113 Ga. 341.

## BOOK IV.

### CONVERSION.

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#### NOTE.

IF A owns a piece of land, and B illegally interferes with it, the law requires B to make compensation to A for the damage done. But that is the extent of B's liability.

If A owns a chattel, and B illegally interferes with it, the law requires B to make compensation to A for the damage done. But frequently that is not the extent of B's liability. The interference may be such that the law will give judgment to A against B for the full value of the chattel, irrespective of the damage done. (The satisfaction of such judgment will transfer A's rights in the chattel to B, and it is often said, therefore, that the interference may be such that the law will require B to purchase the chattel.)

There are in the authorities many distinctions between actions of trespass, trover, and case over which it has ceased to be profitable to linger. If A's chattel is totally destroyed by the illegal act of B, the measure of damage is plain, and the form of action in which A obtains relief should not be, and in most jurisdictions is not, important. But for what interferences by B with the chattel of A will the law give judgment to A against B for the full value of the chattel, irrespective of the damage done? This question survives the obliteration of forms of action, and remains a question of the first importance.

Such interferences are commonly called conversions.

CHAPTER I.  
ACTS CONSTITUTING A CONVERSION.

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SECTION 1.  
INTERFERING WITH THE PLAINTIFF'S POSSESSION OR  
USE OF THE CHATTEL.

*A. Taking the Chattel out of the Plaintiff's Possession.*

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MCPARTLAND v. READ.

11 All. (Mass.) 231. 1865.

CERTAIN furniture of the plaintiff was attached by the defendant Read, who was a deputy sheriff, on a writ against a third person. The other defendant, Foque, acted as the agent of the attaching creditor, in directing and assisting in the attachment.

BIGELOW, C.J. Every tortious taking with intent to apply chattels to the use of the taker or some other person than the owner is a conversion. Both defendants were liable. It was not necessary in order to charge them to show that each actually participated in seizing and removing the property. It was sufficient to prove that both were present, one inciting or directing the wrongful taking, and the other obeying the order and carrying it into effect. Both were principals in the conversion.

NOTE. — In *Donahue v. Shippee*, 15 R.I. 453, the court said (p. 455): "Nor does the fact that the cutting of the grass was unintentional, in the sense that it was done in ignorance of the location of the boundary line, make any difference. It was, nevertheless, a wrongful assumption of dominion over the property of the plaintiff in violation of his right. In *Boyce v. Brockway*, 31 N.Y. 490, 493, it is said: 'Wrongful intent is not an essential element of the conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it.' So, too, in *West Jersey R.R. Co. v. Trenton Car Works Co.*, 32 N.J. 517, 520, the court says: 'In every case in which the inquiry arises whether a conversion has been committed, the only point to be settled is whether the defendant has applied to his own use the prop-



erty of another without his permission and without legal right. His motives for so doing, or the state of his knowledge with reference to the right of such owner, are of no importance, and cannot in any respect affect the case.'"

*Murphey v. Virgin*, 47 Neb. 692. The defendant by force took money from the plaintiff. It was no defense that the plaintiff was indebted to the defendant in an amount as great as the sum taken.

*Summersett v. Jarvis*, 3 Brod. & Bing. 2. The defendants claimed to be the assignees in bankruptcy of the plaintiff. They insisted on the plaintiff's delivering up his books, and he thereupon delivered them. The fact proved to be that the plaintiff was not subject to the bankruptcy statute. The court held that, as the defendants had taken the books when they were armed with the authority of assignees, the plaintiff must be deemed to have delivered them up on compulsion, and that the defendants were thereby guilty of a conversion.

If the officer purports to make a levy upon goods, but does not take them into his possession, he has not converted them. *Herron v. Hughes*, 25 Cal. 555.

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### FOULDES v. WILLOUGHBY.

8 M. & W. 540. 1841.

TROVER for divers, to wit, two horses. — Plea, not guilty.

The cause was tried before MAULE, J., at the last Spring Assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the River Mersey, from Birkenhead to Liverpool, and that on the 15th of October 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steam-boat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of an hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steam-boat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, how-

ever, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned Judge told the jury, that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steam-boat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter Term last, a rule was obtained calling upon the plaintiff to shew cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages: against which rule

*W. H. Watson* and *Atherton* now shewed cause. — The evidence shewed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [Lord ABINGER, C. B. — According to that argument every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. — In that case there is a user of the horse. Lord ABINGER, C. B. — In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. — If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow*, 2 Saund. 470, it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort"; citing *Cro. Eliz.* 824, *Bishop v. Montague*. [Lord ABINGER, C. B. — I cannot agree to that position, at least to the extent for which it is now used.]

Lord ABINGER, C. B. — This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned Judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not

have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare asportavit is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned Judge was wrong, in telling the jury that the simple fact of putting these horses on shore by the defendant, amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore, the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colourable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water, and finding neither the owner nor any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be, that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued, that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If

you will not put them on shore, I will do it for you," and in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all: but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from Strange's Reports, of *Bushell v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom House Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead, that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the Court there said, that whatever ground there might be for an action of trespass, in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held, that the single act of removal of a chattel, independent of any claim over it, either in favour of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and

enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the Judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. — I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say, that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned Judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all times, and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognised them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to

say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go, if their argument in this case be sound. But such is not the law; and the true principle is that stated by CHAMBRE and HOLROYD, JS., when at the bar, in their argument in the case of *Shipwick v. Blanchard*, 6 T. R. 299, that "In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods will also amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury, to say, whether the act done by the defendant, of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, i. e. with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

NOTE. — In *Shea v. Milford*, 145 Mass. 525, the court said (p. 527): "The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction, that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth v. Lowery*, 134 Mass. 512. *Fouldes v. Willoughby*, 8 M. & W. 540. *Heald v. Carey*, 11 C. B. 977. It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question."

*B. Obtaining the Chattel from the Plaintiff by Fraud.*

THURSTON v. BLANCHARD.

22 Pick. (Mass.) 18. 1839.

TROVER to recover the value of certain goods alleged to have been obtained by the defendant, from the plaintiffs, by means of false and fraudulent pretenses.

SHAW, C.J. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. *Buffinton v. Gerrish*, 15 Mass. R. 156.

NOTE. — *Woodworth v. Kissam*, 15 Johns. (N.Y.) 186. Where a creditor by fraud obtains the goods of his debtor, he cannot apply them to the satisfaction of his debt, and the debtor may maintain trover for them.

If B, by fraud, has secured from A the title to A's chattel, and sells the chattel to C, a *bona fide* purchaser, A has no remedy against C. *Williamson v. Russell*, 39 Conn. 406.

If B, by fraud, has secured from A the title to A's chattel, an officer who seizes the goods as the property of B is not a converter. *Thompson v. Rose*, 16 Conn. 71, 83. The assignee of B, who did not pay value but had no notice of the fraud, should not be liable as a converter by reason of taking possession of the chattel. *Goodwin v. Wertheimer*, 99 N.Y. 149. Cf. *Farley v. Lincoln*, 51 N.H. 577.

*C. Leaving the Plaintiff in Possession, but Restraining  
his Use of the Chattel.*

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ENGLAND v. COWLEY.

L. R. 8 Exch. 126. 1873.

TROVER for household furniture.

Plea: not guilty by statute (11 Geo. 2, c. 19, s. 21).

Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of, and remove and sell, the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following. One of the men returned, and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over, them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favour of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for 40*l.*, the value of the goods, if the Court should be of opinion that the learned judge ought to have directed *s*



verdict for the plaintiff. A rule was obtained in Michaelmas Term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did no act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common Law Procedure Act, 1852, and although in the form of declaration there given in sch. B. the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases, by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back"; and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that *something* shall not be done by the plaintiff; he must say that *nothing* shall. Now here there was no interference with the plaintiff's rights except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant

is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of, nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favour of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1872, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house, with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but in order to have the opportunity of distraining he told the plaintiff that he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

[The rule was discharged as KELLY, C.B., and POLLOCK, B., concurred with BRAMWELL, B.]

NOTE.—In *Boobier v. Boobier*, 39 Me. 406, the court said (p. 409): "The proposition, that the use of force by one not having possession of goods, to prevent the true owner from obtaining them, amounts to a conversion of those goods, is not sustained as sound in principle."

## BRISTOL v. BURT.

7 Johns. (N.Y.) 254. 1810.

THIS was an action of trover, brought to recover the value of 95 barrels of potashes. The cause was tried at the Onondaga circuit, the 7th June, 1810, before the Chief Justice.

The defendant was, in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbour, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbour. About the first July, the plaintiff sent 95 barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbour; but the defendant refused to grant it, alleging as a reason for his refusal, that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbour would not do his duty, and that the ashes would be sent from thence to a British port. The defendant at the same time promised the plaintiff, that if he did not receive instructions to the contrary from the secretary of the treasury, within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the secretary of the treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbour would not do his duty, and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbour. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome, in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had a control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the

public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant, not to deliver any property from his store, without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from Oswego up the river, and 13 barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining 82 barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff, a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved, that when the plaintiff applied to the defendant for a clearance to Sackett's Harbour, potashes were worth at that place 180 dollars per ton, and that the expense of transportation was 4 dollars per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was 173 dollars per ton, but would not sell at Salina, in the county of Onondaga, for more than 150 dollars. That when the plaintiff received the ashes, the price of them, in the city of Albany, was 137 dollars and 50 cents, and the expense of transportation from 25 to 30 dollars per ton.

The Chief Justice charged the jury, that in his opinion, there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance, and at the time he received them. And the jury found a verdict for the plaintiff, for 1472 dollars and 20 cents.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

PER CURIAM. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord HOLT, in *Baldwin v. Cole*, 6 Mod. 212, is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorpe's case* (cited in 2 Bulst. 310, 314), where a

piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no *act* done or dominion exercised; but in the present case there were the highest and most unequivocal acts of dominion and control over the property; not only by claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was therefore bringing a charge upon the plaintiff; and this, says Mr. Justice BULLER, in *Syeds v. Hay*, 4 Term Rep. 260, amounts to a conversion. Neither the case of *M'Combie v. Davies*, 6 East, 538, nor the *anonymous* case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord ELLENBOROUGH the test of the conversion, though the property in that case lay not in the defendant's but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. (6 Bac. Abr. 577.) "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion, or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion, that the motion to set aside the verdict must be denied. *Motion denied.*

NOTE. — See *Dodge v. Meyer*, 61 Cal. 405, 420, and cases there cited, and *Hall v. Amos*, 5 T.B. Mon. (Ky.) 89.

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### VILAS v. MASON.

25 Wis. 310. 1870.

A TENANT of a hotel was forbidden by the landlord, ten days before the lease expired, to remove certain articles which belonged to the tenant. The tenant thereafter surrendered up the possession of the hotel and left the articles in it.

PAINE, J. The question is, whether enough is stated to show a conversion by the plaintiff of the articles mentioned in the defend-

ant's counterclaim. The argument on the motion for a rehearing seems to assume, that if, at the expiration of the lease, when the lessee was about to exercise his right of removing such property as belonged to him, the lessor should claim certain articles attached to the premises as his own, and forbid the tenant to remove them, it would be a conversion. This there would seem to be no room to doubt. It would clearly be such a wrongful assumption of control over the property, and such an interference with the owner's right, as would constitute a conversion. The only doubt that arises upon the point is, whether the same acts, occurring before the expiration of the lease, and while the tenant remains in the undisturbed possession of the premises, not attempting to exercise his right of removal, would also amount to a conversion. It may well be, that in general the assertion by one person of a claim to property in the undisturbed possession of another, even though accompanied by a forbiddance of its use, would not be a conversion. But, without attempting to settle any general rule upon the subject, we are of the opinion, that where a dispute arises between a landlord and tenant in respect to the ownership of articles, which, if they belong to the tenant with a right of removal, are personal property, but which, if they belong to the landlord, are fixtures and a part of the realty, and the landlord, just before the expiration of the lease, but contemplating that result, and with a view to affect the action of the tenant at such approaching expiration, claims title to such articles and forbids the tenant to remove them, and threatens him with an injunction if he attempts it, the tenant may, on surrendering the premises, leave the articles, and treat the acts of the landlord as a conversion. The fact that these acts occurred a few days before the actual surrender of the premises is not material, so long as they were so near that event, and were intended and understood by both parties to have direct reference to it. A landlord claiming such fixtures may obtain an injunction against an outgoing tenant who threatens to remove them. Gibbons on the Law of Fixtures, p. 70 (11 Law Library). And to make such remedy effectual, he would have to obtain it before the tenant actually removed the fixtures. It is one of the instances where equity would interfere to prevent the threatened wrong. Such being the case, the landlord being in a position, by reason of the peculiar character of the property, to enforce his threat, if he will take the responsibility of forbidding the tenant to remove such articles at the expiration of a lease then about to expire, under threat of an injunction, this should fairly be regarded as such an assumption of control over the property, and such an interference with the tenant's right, as to amount to a conversion.

*See a list  
his name for  
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## SECTION 2.

## WITHHOLDING THE CHATTEL FROM THE PLAINTIFF.

## BALDWIN v. COLE.

6 Mod. 212. 1704.

TROVER. The case, upon evidence, was this: A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

HOLT, Chief Justice. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them: so the taking and carrying away another man's goods is a conversion: so if one come into my close, and take my horse and ride him, there it is conversion: and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages: and he made no account of the pretended usage, but compared it to the doctrine among the army that if a man came into the service, and brought his own horse that the property thereof was immediately altered, and vested in the queen; which he had already condemned.

NOTE. — The cases in support of the principal case are very numerous.

*Clark v. Hale*, 34 Conn. 398. The chattel was in the defendant's possession, but was at a distance from the place where plaintiff demanded it, and could not have been at once delivered. The defendant absolutely refused to deliver the chattel, and was held to have converted it.

*Bassett v. Bassett*, 112 Mass. 99. A refusal to perform a promise to repay money lent is not a conversion.

## GREEN v. DUNN.

3 Camp. 215. 1811.

TROVER for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier.

The plaintiff to whom the timber belonged having demanded it of the defendant, the latter said: If you will bring any one to prove it is your property, I will give it you, and not else.

LORD ELLENBOROUGH. — This is a qualified refusal, and no evidence of conversion. *Plaintiff nonsuited.*

NOTE. — In *Robinson v. Burleigh*, 5 N.H. 225, the court said (p. 228): "Although the plaintiff may, in fact, have been entitled to the horse, we think that the refusal by the defendant to deliver him, must be considered as the result of a reasonable hesitation in a doubtful matter, and that it cannot, under the circumstances, be adjudged sufficient evidence of a conversion."

## ALEXANDER v. SOUTHEY.

5 B. &amp; Ald. 247. 1821.

TROVER for printing types and other goods. Plea, general issue. At the trial at the last Guildhall sittings before BEST, J., it appeared that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the Company. The only evidence of a conversion was, that when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion Office. The learned Judge left it to the jury to say, whether this qualification of the defendant's refusal was a reasonable one, telling them, that if so, he was of opinion, that there was not sufficient evidence of a conversion. The jury accordingly found a verdict for the defendant.

BAYLEY, J. If the plaintiff in this case had informed the defendant, that he had previously made application to the Insurance Company, and that they had refused permission for the delivery of the property, or had told the defendant, that he expected him to go and get an order, authorizing the delivery of the property, and after that, the defendant had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his



part: but here the defendant had the goods in his possession as the agent of the Insurance Company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

HOLROYD, J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the Insurance Company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case, the goods came into the defendant's possession lawfully, and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now it is clear, that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay*, 2 Mod. 242, is an authority in point. There, the servant refused to deliver back some sheep which were on his master's land; and it was held to be no conversion on his part. I am therefore of opinion, that the rule should be refused.

NOTE. — There is a valuable review of the earlier cases on qualified refusals in *Dent v. Chiles*, 5 Stew. & Port. (Ala.) 383.

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### WILSON v. ANDERTON.

1 B. & Ad. 450. 1830.

CHATELS belonging to A came into the hands of B. B deposited them in the warehouse of C. A demanded them of C, and C refused to give them up without directions from B. A made no offer of indemnity to C, and C asked for no indemnity. B had no right in the goods against A. The question was whether, on these facts, C had converted the chattels.

LORD TENTERDEN, C.J. If the law be, as is now contended, there has rarely been a sitting at *Guildhall* where injustice has not been done; for the title to goods has been repeatedly tried in actions against warehousemen. A bailee can never be in a better situation than the bailor. If the bailor has no title, the bailee can have none, for the bailor can give no better title than he has. The right to the property may, therefore, be tried in an action against the bailee, and a refusal like that stated in the case has always been

considered evidence of a conversion. The situation of a bailee is not one without remedy. He is not bound to ascertain who has the right. He may file a bill of interpleader in a court of equity. But a bailee who forbears to adopt that mode of proceeding, and makes himself a party by retaining the goods for the bailor, must stand or fall by his title. See Com. Dig. Chancery, 3 T.

LITTLEDALE, J. There is no doubt that the property in the goods was in the plaintiffs, and that the defendant or Captain Mondell had not any lien on them for salvage. The question is, Whether, under the circumstances stated in this case, the bailee can set up any title against the real owner? What is the situation of a bailee? He has no other title, except that which the bailor had. As to the *nisi prius* case before GOULD, J., it is not applicable to the present point. There the carrier, on the goods being demanded by a third party, voluntarily identified himself with that party, by proposing to retain them on an indemnity, and offering to set up the title of that party on an action by the bailor. Now a lessee cannot dispute the title of his lessor at the time of the lease, but he may shew that the lessor's title has been put an end to; and therefore in an action of covenant by the lessor a plea of eviction by title paramount, or that which is equivalent to it, is a good plea, and a threat to distrain or bring an ejectment, by a person having good title, would be equivalent to an actual eviction. So here, if the bailor brought an action against the defendant as bailee, the latter might, on the same principle, shew that the plaintiff recovered the value of the goods, or that, on being threatened with an action by a person who had good title to the goods, he had delivered them to him. Then, the next question is, Whether there was evidence of a conversion? I think there was; for the defendant rested his right to retain on the right of the bailor, who had no right whatever. There was an unqualified refusal, and that is evidence of a conversion, unless the party refusing can shew an adverse right to the immediate possession.

NOTE. — See, *accord*, *Lee v. Bayes*, 18 C. B. 599; *Rogers v. Weir*, 34 N.Y. 463, 471.

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### SINGER MANUFACTURING CO. v. KING.

14 R.I. 511. 1884.

DURFEE, C.J. This is trover for the conversion of a sewing machine belonging to the plaintiff company. The case was tried in the Court of Common Pleas and comes here on exceptions. The testimony given at the trial for the plaintiff went to show that the machine was demanded of the defendant by direction of Charles H.

Harris, agent for the plaintiff, and that the defendant, who was agent for the American Sewing Machine Company, though he had the machine, refused to deliver it until storage was paid for it or until another machine belonging to the American Sewing Machine Company which the plaintiff had was returned. The defendant testified that the machine was brought to him by one Conner, an employee of the American Sewing Machine Company; that he was instructed to hold it for storage, and that, though he did not announce it when the demand was made, the plaintiff knew that he was agent for the American Sewing Machine Company. It further appeared that the machine had been leased to a Mrs. Lynch by the plaintiff company; that Conner had received it from her, leaving a machine of the American Company in place of it; that he had carried it to Harris and that Harris refused to receive it, saying that his company had no machines out which were then due; that he then carried it to the American Sewing Machine Company and told Harris that he had done it. Harris testified in reply that he did not see the machine when Conner brought it and that he had not authorized any one to store it with the American Company.

1. The court instructed the jury that if the defendant, when demand was made upon him, was the agent of the American Sewing Machine Company, and was holding the machine under their orders and not for himself or under his own control, then the defendant would not be guilty. The plaintiff excepted.

2. The plaintiff asked the court to instruct the jury that the defendant would be guilty unless he told the plaintiff when the demand was made that he was holding the machine as servant of the American Sewing Machine Company. The court refused so to instruct the jury, but did instruct them that the defendant's omission to give the information would not constitute a conversion, but would be evidence for them to consider in determining the question as to whether he was holding the machine as agent or not. The plaintiff excepted. The question is, were the instructions and the refusal to instruct correct.

Ordinarily, when one person has the chattel of another, it is his duty to deliver it to the owner or his agent on demand, and if he refuses to do so, his refusal is evidence of a conversion. It is, however, only *prima facie* evidence and may be explained. *Magee v. Scott*, 9 Cush. 148; *Robinson v. Burleigh*, 5 N.H. 225; *Dietus v. Fuss*, 8 Md. 148; *Green v. Dunn*, 3 Camp. 215; *Solomons v. Dawes*, 1 Esp. 83. Thus it is no conversion for the bailee of a chattel, who has received it in good faith from some person other than the owner, to refuse to deliver it to the owner making demand for it until he has had time to satisfy himself in regard to the ownership. *Carroll v. Mix*, 51 Barb. S.C. 212; *Lee v. Bayes*, 18 C. B. 599, 607; *Sheridan v. The New Quay Co.*, 4 C. B. N.S. 618; *Coles v. Wright*, 4 Taunt. 198. In the case of a

servant who has received the chattel from his master, it has been held that he ought not to give it up without first consulting his master in regard to it. *Mires v. Solebay*, 2 Mod. 242, 245; *Alexander v. Southey*, 5 B. & A. 247; *Berry v. Vantries*, 12 Serg. & R. 89. But if, after having had an opportunity to confer with his master, he relies on his master's title and absolutely refuses to comply with the demand, he will be liable for a conversion. *Lee v. Robinson*, 25 L. J. C. P. 249; 18 C. B. 599; 1 Addison on Torts, § 475; *Greenway v. Fisher*, 1 Car. & P. 190; *Stephens v. Elwell*, 4 M. & S. 259; *Perkins v. Smith*, 1 Wils. 328; *Gage v. Whittier*, 17 N.H. 312. The mere fact that he refuses for the benefit of his principal will not protect him. *Kimball v. Billings*, 55 Me. 147.

In the case at bar the defence is that the defendant, acting as agent of the American Sewing Machine Company, refused to deliver the machine in obedience to instructions not to deliver it until storage was paid for it. The defendant did not refuse for the purpose of consulting his principal, but it would seem that he had received his instructions before the demand in anticipation of it. He was not a mere servant but an agent, and he may have been, for anything that appears, a general agent. The machine came to him, not from his master or principal, as in *Mires v. Solebay*, but from a fellow employee, and he may have known, indeed the evidence carries the impression that he did know, all the circumstances in regard to it, and nevertheless coöperated with his principal in withholding it from its owner by insisting on a condition which neither he nor his principal had any right to impose. If such was the fact, we think he was guilty; and yet, if such was the fact, the jury might have found him not guilty under the instructions given by the court which are the ground of the first exception. The first exception must therefore be sustained. We do not find any error in the instructions which are the ground of the second exception, except in so far as they involve a repetition of instructions before given. The case will be remitted for new trial.

*Exceptions sustained.*

NOTE. — *Mires v. Solebay*, 2 Mod. 242. The defendant, a servant of one Marwood, refused to deliver up sheep to the plaintiff. Both the plaintiff and Marwood claimed title to the sheep. The defendant was held not guilty of conversion. The court said (p. 244): "The action will not lie against the servant; for it being in obedience to his master's command, though he had no title, yet he shall be excused. And this rule JUSTICE SCROGGS said would extend to all cases where the master's command was not to do an apparent wrong; for if the master's case depended upon a title, be it true or not, it is enough to excuse the servant; for otherwise it would be a mischievous thing, if the servant upon all occasions must be satisfied with his master's

title and right before he obey his commands; and it is very requisite that he should be satisfied, if an action should lie against him for what he doth in obedience to his master. But it was said, the servant cannot plead the command of his master in bar of a *trespass*."

In *Lee v. Bayes*, 18 C.B. 599, WILLIAMS, J., said (p. 608): "Where the servant or agent absolutely and unqualifiedly repudiates the title of the owner, and relies upon that of his master or bailor, as in *Wilson v. Anderton*, 1 B. & Ad. 450, his refusal to admit the title of the owner amounts to a conversion."

In *Elmore v. Brooks*, 6 Heisk. (Tenn.) 45, a railroad agent, under orders from the superintendent to deliver no goods consigned to persons who had gone into the Federal lines, refused to deliver goods to the order of such a consignee. It was held that the agent was himself liable to the consignee.

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### THOROGOOD v. ROBINSON.

6 Q. B. 769. 1845.

CASE for an excessive distress, with a count in trover for lime, flints and breeze. Pleas, to the count in trover, 1. Not Guilty. 2. Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord DENMAN, C.J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a limeburner, and, in January, 1844, was in possession of some land and of the lime, breeze, etc., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who, at the time, were loading a barge there with part of the lime. He refused to let them do any thing to the kiln fires, or put any more of the lime on the barge. The defendant's evidence shewed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

LORD DENMAN, C.J. In leaving this case to the jury, I endeavoured to act in conformity with the decision of this court in the case of *Needham v. Rawbone*, Mich. T. 1844, and I said that it was a question for the jury whether the conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them: if the defendant had then refused to deliver them or to permit the plaintiff or his servants to remove them, there would have been a clear conversion; but it does not necessarily result from the facts proved in this case that the defendant was guilty of a conversion. I am inclined to think that the plaintiff is entitled to a verdict on the issue on the plea of Not possessed, which will probably be given up as it only affects the costs of that issue.

PATTESON, J. The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods; or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

*Rule refused.*

NOTE. — See *Delano v. Curtis*, 7 All. (Mass.) 470.

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NICHOLS v. NEWSOM.

2 Murphey (N.C.) 302. 1813.

THIS was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, but not banked or turfed. Upon the trial it appeared, that a judgment had been obtained against the defendant, on which an execution was issued and levied on the said lightwood, which was duly advertised and sold and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf, and burn the kiln as it then stood, which liberty the defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose, he

would sue him. There was no evidence of an actual conversion, and at the time the suit was commenced, the kiln remained in the same situation in which it was when purchased by the plaintiff. The plaintiff was permitted to take a judgment for twenty pounds, the value of the kiln, with leave to the defendant to have the verdict set aside and a non-suit entered, provided the court should be of opinion the plaintiff was not entitled to recover in this action, on the foregoing facts, and on motion of the defendant the case was transmitted to this court for the opinion of the judges. On this case, the court were divided in opinion.

LOWRIE, Judge, delivered the opinion of the majority of the court.

The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood was a chattel of this description, and the purchase under the execution vested in the plaintiff a right to it. The lightwood, however, being bulky, and too cumbersome to be immediately moved from the defendant's land on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent and in his possession until the necessary arrangement could be made for taking it away. In all cases where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever therefore a man purchases heavy articles at a sheriff's sale, such as corn, fodder, hay-stacks, etc., which it is not presumable he is prepared immediately to take away, he may, if not prohibited by the debtor, return in a peaceable manner and lawfully enter upon the freehold, or into the enclosures of such debtor, or other person on whose land such articles were sold for the purpose of taking them away. But in the present case, such presumption ceased to exist the moment the defendant expressly prohibited the plaintiff from entering upon his freehold and threatened him with a suit, if he did enter. After such express prohibition, the entry of the plaintiff could not be a peaceable and lawful one. The law will not permit one man to enter upon the possession of another for the assertion of a mere private right, which he may have to an article of personal property, against the express prohibition of him in possession; such permission would be attended with consequences very injurious to the peace of society. We therefore think, that the refusal of the defendant, as stated in this case, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion." Com. Dig. action on the case, Title Trover E. This case differs from that to be found in Gilbert's Law of Evidence, 262,





## DEARBOURN v. UNION NATIONAL BANK.

58 Me. 273. 1870.

APPLETON, C.J. This is an action of trover against the defendants for the alleged conversion of certain bonds of the United States, together with the coupons attached. The bonds were left with the bank either as security for notes of the plaintiff discounted there, or on deposit. In either event, the bank would be liable in trover for a conversion to its own use of the plaintiff's bonds, but not for a loss through negligence or by larceny.

~~In trover, a demand and refusal make out a *prima facie* case.~~ But this is rebutted by proof that the property demanded was not at the time of the demand in the defendants' possession, nor under their control. *Boobier v. Boobier*, 39 Maine, 407. Trover will not lie against a bailee when the goods have been lost or stolen. *Hawkins v. Hoffman*, 6 Hill, 586. There must be some wrongful act on the part of the defendant. A loss by mere nonfeasance will not sustain this form of action. *Bowlin v. Nye*, 10 Cush. 416. Trover cannot be maintained against a common carrier for not delivering goods intrusted to him for transportation, if the goods are not in his possession at the time of the demand, and have been either lost or stolen. *Packard v. Gilman*, 4 Wend. 613. Indeed there seems an entire concurrence of authorities that in case of a loss of goods by a bailee, or of a larceny from him, that he is not liable in trover.

The evidence fails to show how the loss of the bonds in question occurred. They may have been lost, stolen, or misdelivered. The evidence tends equally to sustain any one of these propositions. In such case no one of them can be regarded as established. Here, the action can only be maintained on proof of misdelivery, if at all, and that fact is not shown. *Smith v. First National Bank in Westfield*, 99 Mass. 605.

The demand for these bonds was made by the plaintiff in August, 1868, and by his attorney in the following October. The proof is satisfactory that before either of these dates the bonds in question had ceased to be in the custody or under the control of the defendants.

If they were stolen or lost through negligence, whatever remedy the plaintiff has is in assumpsit, when a contract is proved to exist, or in case, for negligence. The writ contains only a count in trover, and the evidence fails to establish any conversion by the defendants.

*Plaintiff nonsuit.*

NOTE. — In *Johnson v. Couillard*, 4 All. (Mass.) 446, the defendant had requested the trial justice to rule "that no recovery can be had in this action against the defendant, unless it shall appear that

*this demand is not made by the plaintiff*

before the demand and refusal he actually converted said property, or that at the time of the demand and refusal he had it in his power to give up the property." The trial justice omitted to comply with this request. The court said this was palpable error. See, *accord*, *Hill v. Covell*, 1 N.Y. 522; *Morris v. Thomson*, 1 Rich. (S.C.) 65; *Knapp v. Winchester*, 11 Vt. 351.

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### BOARDMAN v. SILL.

1 Camp. 410. 1808.

TROVER for some brandy, which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The Attorney-General contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But Lord ELLENBOROUGH considered, that as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, — which would admit of some doubt.

The plaintiff had a verdict.

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### SCARFE v. MORGAN.

4 M. & W. 270. 1838.

TROVER for a mare. Pleas, first, not guilty; secondly, that the mare was not the property of the plaintiff. At the trial before PARKE, B., at the last Assizes for the county of Suffolk, it appeared that the mare in question had been sent on more than one occasion to the premises of the defendant, who was a farmer, to be covered by a stallion belonging to him, and the charge of 11s. for the last occasion not having been paid, the defendant refused on demand to deliver up the mare, claiming a lien not only for the 11s., but for a further sum amounting altogether to 9l. 7s. 4½d., for covering other mares belonging to the plaintiff, and including also a small sum for poor-rates; on which demand and refusal, the plaintiff, without making any tender of the 11s., brought the present action.

PARKE, B. As to the first point argued by Mr. Kelly, the court are unanimous in considering that if the defendant had a lien, he did not waive it under the circumstances of this case, by claiming to hold the mare not merely for the expense of covering her, but also for thr

expense of covering other mares belonging to the same plaintiff, and also for some payments made in respect of poor-rates which he had against him. The only way in which such a proposition could be established, would be to shew that the defendant had agreed to waive the lien, or that he had agreed to waive the necessity of a tender of the minor sum claimed to be due. Looking at the mode in which he made the claim, and at the ground on which he considered it to be made, I think it is clear he has not waived the lien, or excused the necessity of making a tender; for when the demand was made, he said, "I have a general account with you, on which a balance is due to me of so much," and part of it was, particularly, a charge of 11s. for covering this mare. The cases referred to by Mr. Kelly seem to be distinguishable from the present. In the case of *Boardman v. Sill*, the defendant did not mention his lien at all, but claimed to hold the goods on the ground of a right of property in them, and did not set up any claim of lien at all. In *Knight v. Harrison*, the ground of refusal was, that the right of property was in another person as to the goods in question, and that he had a general lien for expenses on those goods. Neither of those two cases appears to me to apply to the present. In this case it would be strange to say that the defendant meant to waive his lien of the 11s., when that was one of the things he said he would hold the mare for, and it would be equally strange to say that he meant to excuse the tender of that sum, when no tender was made of any sum at all. I do not mean to say that such circumstances may not occur as would amount to the waiver of a lien, and of the tender, but that a great deal more must have passed than was proved to have passed on the present occasion. If he had said, "You need not trouble yourself to make a tender of the sum for which I have a lien, and I shall claim to hold the mare for it," the plaintiff would then be in the same situation as if a tender had been made; but we think the defendant cannot be deprived of his right of holding the property on which he had a lien, by any thing that has passed on the present occasion.

ALDERSON, B. It seems to me a monstrous proposition, to say that a party who claims in respect of two sums to detain a mare, is to be supposed to have waived his right to detain her as to one. The more natural conclusion is, that the defendant intended to act upon both; if so, and if the other party is informed of that, it then became his duty to consider whether he would tender one or the other; and with respect to the observation that has been cited as having fallen from Lord TENTERDEN, that, if the defendant had given notice, the plaintiff would have paid, an equally strong observation appears to arise the other way; for probably had the plaintiff said, "I tender you this sum, which I admit I am bound to pay," it might cause the defendant to reflect whether he really had a right to detain the mare as to the other. It seems to me you cannot say, that, because the party claims

more than it may be ultimately found he had a right to, he would not have a right to a tender of the sum which the other ought to pay.

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JONES v. TARLETON.

9 M. & W. 675. 1842.

TROVER for pigs. — Pleas; first, not guilty; secondly, not possessed; on which issues were joined. At the trial before COLTMAN, J., at the last assizes for Anglesey, it appeared that the plaintiff was a pig-drover in Anglesey, and the defendant was the owner of a steam-vessel, plying between the Menai Bridge and Liverpool. The plaintiff had been in the habit of shipping pigs by the defendant's vessel for Liverpool; and on the 30th January, 1841, he sent by it a number of pigs, of which, on their arrival at Liverpool, the defendant's agent there detained three, to satisfy an alleged lien in respect of a balance which he claimed to be due from the plaintiff on the freight of former shipments. On the 19th February, the plaintiff shipped another cargo, the whole of which the defendant, by his agent, detained on the same ground. There was conflicting evidence as to whether the plaintiff had made any offer of payment of the freight of these two cargoes; but according to the evidence of the witnesses for the plaintiff, he had, on each occasion, produced a purse of sovereigns, and stated that he was ready to pay the freight for that cargo, but the defendant's agent claimed a further sum of about £5, in respect of the old balance, which the plaintiff refused to pay, denying that it was due. No precise amount was, however, actually tendered by the plaintiff.

The trial judge told the jury that if they thought the plaintiff was ready to pay all that was really due from him, but did not pay it because the defendant demanded something more, that was sufficient, without tender or payment of the specific sum.

PARKE, B. As to the tender, the direction of the learned judge amounts to this, that if the defendant refused to deliver the pigs until payment of the old account, which he had no right to demand, that was a waiver of an express tender. I think it was a perfectly correct direction.

ALDERSON, B. I am of the same opinion. With respect to the question as to the sufficiency of the tender, I think if the defendant absolutely refused to deliver the pigs when they were demanded, until payment by the plaintiff, not only of the freight for that particular cargo, but also of the freight due on a former account, and which, as now appears by the finding of the jury, the defendant was not entitled to demand, that must be considered as a waiver of any tender of the precise sum really due, and which the plaintiff was

ready to pay: it was equivalent to saying to the plaintiff, "Do what you will, tender what you will, it is of no use, I will not receive it unless you pay the old account also." It would have been different if the defendant had merely demanded too large a sum in respect of the same subject-matter; in that case, the plaintiff would perhaps have been bound to tender a reasonable sum, before he could have been entitled to the possession of the goods demanded.

*Rule refused.*

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HANNA v. PHELPS.

7 Ind. 21. 1855.

DAVISON, J. The court, upon the defendants' motion, gave a written statement of the facts on which its finding was based, and of the conclusions of law arising on the facts. That statement is as follows:

1. The plaintiff delivered to the defendants, as bailees, two thousand one hundred hogs' heads, out of which lard was to be rendered by them for him, which heads each produced four pounds of lard, making eight thousand four hundred pounds.

2. The defendants delivered to the plaintiff, at Jackson's warehouse, in the town of Wabash, in twenty-three barrels, five thousand one hundred and sixty-two pounds of lard, leaving unaccounted for and undelivered, three thousand two hundred and thirty-eight pounds. The lard was worth 5 cents per pound, making for the last-named quantity, in money, 161 dollars and 90 cents. As a compensation for rendering said lard, the defendants were entitled to 84 dollars, leaving a balance due the plaintiff of 77 dollars and 90 cents.

3. The plaintiff, after the delivery of the twenty-three barrels, and before the commencement of this suit, notified the defendants to deliver to him all the lard made from said heads; but they declined to deliver any more lard. He did not, at any time before this suit, either pay or tender to them any sum for their services, nor was any demand made by them for such services. When the twenty-three barrels were delivered, the lard was subject to their claim for rendering the same, amounting to 51 dollars and 63 cents, which amount was never paid to them. The delivery at Jackson's warehouse was with his consent.

These were all the facts proved in the cause; and upon them the court, as a conclusion of law, decided that no payment or tender for services in rendering the lard was necessary before suit.

Was this decision correct? Generally speaking, if a chattel delivered to a party receive from his labor and skill an increased value, he has a specific lien upon it for his remuneration, provided there is nothing in the contract inconsistent with the existence of the lien.

And such lien exists equally whether there be an agreement to pay a stipulated price for "the labor and skill," or an implied contract to pay a reasonable price. The present is one of the cases in which liens usually exist in favor of the party who has bestowed services on property delivered to him for the purpose. And unless the record discloses facts or circumstances sufficient to produce the inference that the defendants waived their lien before the institution of this suit, they were not compelled to give up the property, when the plaintiff demanded it, without the payment or tender of a reasonable compensation for rendering and barreling the lard. If the defendants, at the time of the demand, had refused, on the ground of their lien, to part with the property, the law of this case would be clearly in their favor; but here the plaintiff's demand was answered by an absolute refusal to deliver any more lard. We are therefore to inquire whether that refusal waived the lien.

Upon this subject the authorities are not uniform. In England, the rule seems to be, that a person having a lien upon goods, does not waive it by the mere fact of his omitting to state that he claims them in that right, when they are demanded. But if a different ground of retention than that of the lien be assumed, the lien ceases to exist. *White v. Gainer*, 9 Moore, 41; 2 Bing. 23; 1 Carr. and P. 324; 1 Camp. 410. It is, however, contended that the refusal of the defendants to have shielded them, should have been qualified by their claim of a lien. There is authority in support of that position. *Dow v. Morewood*, 10 Barb. 183, was replevin for twenty-one cans of oil. In that case, it was held "that the defendant, having, upon demand made, refused to deliver the oil to the plaintiff without setting up any lien thereon, waived his right to set up a lien afterwards for freight, etc.; that he could not be allowed to deny the plaintiff's title, before suit brought, and afterwards defeat a recovery by setting up a lien."

We are inclined to adopt this rule of decision. An unqualified refusal, upon a demand duly made, is evidence of a conversion; because it involves a denial of any title whatever in the person who makes the demand. In the case before us, the defendants "declined to deliver any more lard." This was, in effect, an assumption that they had in their possession no more belonging to the plaintiff. At least he had a right to infer from their answer to his demand, that they would deliver to him no more lard, unless compelled to do so by action at law. And having thus assumed a position relative to the property inconsistent with his title, he had, further, the right to infer that a tender to the defendants for their services would be unavailing. We are of opinion that the facts proved are sufficient to sustain the judgment.

NOTE. — In *Spence v. McMillan*, 10 Ala. 583, the court said (p.

588): "It is not shown that the defendant was entitled to any compensation for keeping the money or slave, but if such was the case, he would not be allowed to defend this suit on this point, unless he insisted on the claim for compensation, as the only excuse for failing to deliver it when it was demanded."

In *Thompson v. Rose*, 16 Conn. 71, the court said (p. 85): "He set up no such claim at the time but made an unqualified refusal. Had this refusal been qualified, by this claim of lien, the plaintiffs might have met it, and obviated it; but the defendant keeps it a secret in his own breast, and now seeks to defeat the plaintiffs' action, by a claim before unknown."

See also *Fowler v. Parsons*, 143 Mass. 401, 407; *Judah v. Kemp*, 2 Johns. Cas. (N.Y.) 411; *Williams v. Smith*, 153 Pa. 462.

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### FOLSOM v. BARRETT.

180 Mass. 439. 1902.

HAMMOND, J. On July 27, 1899, the plaintiff had a lien upon the horse Sun Pointer, to secure him for the payment of the expenses of its keeping up to that time. The amount due as claimed by the plaintiff was \$300.96, and, although requested by the defendant, he refused to deliver up the horse except upon the payment of that sum. The auditor has found that the balance due at that time was only \$129.17.

The defendant requested the judge to rule in substance, that (1) if the defendant demanded the horse of the plaintiff and the plaintiff refused to deliver him up except upon the payment of a certain sum which was larger than the sum actually due, then as matter of law the plaintiff wrongfully held the horse; and, (2) if the defendant requested of the plaintiff a statement of the amount due, so that the defendant could pay what was due and take his horse, and if upon that the plaintiff stated that he would not give up the horse except upon the payment of a certain sum then named by him which was materially in excess of the amount actually due, then the defendant was not bound to tender any sum to the plaintiff, and the latter wrongfully held the horse.

The judge refused to rule as requested, but ruled in substance, that if the plaintiff fraudulently claimed more than was due for the purpose of keeping possession of the horse, he wrongfully kept the horse; but that if he believed the sum due him to be as stated by him at the time he refused to deliver the horse, then the fact that that sum was excessive would not work a discharge of the lien. No instructions were given as to the subject of tender.

Where a lienor bases his refusal to surrender property upon some

right independent of or inconsistent with the lien, it is held that he has waived his lien and he cannot afterwards set it up. *Boardman v. Sill*, 1 Camp. 410, n.; *Dirks v. Richards*, 4 Man. & Gr. 574. But that is not this case. Here the plaintiff expressly named his lien and insisted upon it, and there was no question as to its nature. It was for the keeping of the horse a certain definite time. He based his right to hold the horse upon that lien and upon nothing else. His demand, however, was excessive. He was right as to the existence of the lien upon which right alone he was insisting, but wrong as to the amount due. If he fraudulently claimed more than was due he lost his lien, but if his claim was made in good faith, it was still in the power of the defendant to discharge the lien by a payment of the sum actually due. If such a payment had been made at that time, the lien would have been destroyed and consequently the subsequent detention of the horse by the plaintiff would have been wrongful; and that would have been so whether or not the plaintiff honestly believed his claim to be correct. The lien was simply a right to hold the horse until a certain sum was paid, and when that sum was paid the right was gone. The good faith of the plaintiff could not increase that sum. The same result would have followed if a tender of the sum due had been made and refused. *Co. Lit.* 207 a; *Coggs v. Bernard*, *Ld. Raym.* 909, 917; *Bac. Abr.* Bailment (B); *Jarvis v. Rogers*, 15 *Mass.* 389, 409; *Schayer v. Commonwealth Loan Co.*, 163 *Mass.* 322, and cases cited.

No payment or tender, however, was made; and where, as in this case, there is a lien which is insisted upon by the creditor and his only error is in making an excessive demand which he honestly believes to be correct, the fact that the demand is excessive does not ordinarily relieve the debtor from the necessity of making a tender. If the debtor desires to avail himself of this honest mistake of the creditor, he must make or tender payment of the sum actually due, and neither the ability, readiness or simple offer to pay is a tender. There must be an actual production of the money, unless such production be dispensed with by the express declaration of the creditor that he will not accept it or by some equivalent declaration or act. *Thomas v. Evans*, 10 *East*, 101; *Breed v. Hurd*, 6 *Pick.* 356. See *Chit. Con.* (10th Am. ed.) 890, 891, and cases cited.

We are of opinion, that there is no evidence in this case of any declaration or conduct of the plaintiff which would excuse the defendant from making an actual tender. It is true that the bill recites, that the plaintiff refused to deliver up the horse except upon the payment of the \$300.96, but it does not appear that the defendant ever desired or attempted to make, or indeed that he ever was ready to make, any tender whatever, or that the plaintiff ever had any reason to suppose that in any of the interviews with the defendant the latter was thinking of a tender, or was prepared then and there



to make it or to make any exhibition of money. Under these circumstances, the simple statement made by the plaintiff at the time the horse was demanded, that he would not deliver him up except upon payment of the whole sum, is not enough to warrant a finding, that he had dispensed with the right to an exhibition of the money of the defendant, or in other words, that he had waived the right to a formal and complete tender; and the judge presiding at the trial was right in declining to instruct as to the law of tender.

The case is clearly distinguishable from *Hamilton v. McLaughlin*, 145 Mass. 20, upon which the defendant relies. There being no tender and no lawful excuse for not making one, there was no error in instructing the jury that in this case the lien was not lost by the excessive demand made by the plaintiff in good faith. *Kerford v. Mondel*, 5 H. & N. 931; *ALDERSON, B.*, in *Jones v. Tarleton*, 9 M. & W. 675; *Jones, Liens*, §§ 1025, 1026, and cases therein cited. See also *Fowler v. Parsons*, 143 Mass. 401.

### CASS v. HIGENBOTHAM.

100 N.Y. 248. 1885.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made June 30, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict directed by the court. (Reported below, 27 Hun, 406.)

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ant the jewelry for which suit had not been brought, upon payment of the note, but defendant had refused to accept such portion, and to make payment. The facts set forth in the answer and reply were sufficiently proved on the trial, and it was proved that the action brought by the wife of defendant for a portion of the diamonds, to which both plaintiff and defendant in this action are parties, is still pending undetermined.

Upon this state of facts the court below directed a verdict for the plaintiff for the amount of the note, to which defendant's counsel duly excepted.

MILLER, J. It only remains to be considered whether the conceded facts in the pleadings and the proof upon the trial show a conversion of the property. Unless the refusal to return the property was justified there was clearly a conversion of the same by the plaintiff, and the defendant had a right of action for the recovery of the value thereof or of the property itself, or to interpose the defense set up by him as a counter-claim to the plaintiff's demand. We are unable to discover any ground upon which the plaintiff could establish a right to retain the property after a demand, if the defendant was entitled to the same as the owner thereof. The fact that a portion of the property was claimed by another person, and that a suit had been brought for a recovery thereof, and that the defendant had been made a party defendant in said action, furnishes no justification for the refusal. If the defendant was the owner of the property he had a right to it, and the plaintiff was not justified in refusing to comply with his demand for the reason that it was claimed by, and a suit had been brought for the recovery thereof by a third person. If he unlawfully refused to surrender the goods to the true owner, when demanded, he must abide the consequences of his own act. So long as the plaintiff retained possession without right he was liable to the true owner for the same or the value thereof. A delivery to the true owner would have been an entire protection to the plaintiff and a complete defense to the action brought against him.

The plaintiff as bailee had no right to deny the title of the defendant as bailor, if he, the bailor, was the true owner of the property. If there were conflicting claims to the same, the plaintiff had a complete remedy by bringing an action in the nature of a bill of interpleader, making the claimants parties thereto, and in that form of an action it could be determined who was the true owner of the property. In that way he could have avoided all risk or hazard. Having thus failed to assert his rights, he is in no position to claim that the action brought against him bars the right of the defendant to counter-claim his demand in this action. *Welch v. Sage*, 47 N.Y. 143.

The action brought by the wife of the defendant and to which the defendant was made a party was no protection to the defendant. She had a right to discontinue it at any time. If determined adversely

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to her, defendant was without any relief whatever in that action. He would still be left to an action against respondent to recover the property or the value thereof. The controversy might thus be extended beyond reasonable limits to the defendant's injury if he was the true owner, and possibly to his eventual loss by the long delay. The pendency of this action was clearly no answer to the defense interposed by the defendant. By a bill of interpleader the whole matter could have been disposed of in a single action.

NOTE. — In *McCalla v. Clark*, 55 Ga. 53, the pledgor tendered the amount of the debt, long after the maturity of the debt. The pledgee refused to deliver the pledged property, claiming that the pledgor had forfeited his interest. Subsequently, on the same day, after consultation with counsel, the pledgee offered to return the property if the pledgor would pay him the amount due on the note, together with the amount which he had been required to expend to preserve the pledged property. The trial court charged the jury that the refusal of the defendant to deliver the stock upon the tender being made as above stated, claiming the same to have become his individual property, would constitute a conversion; but that the plaintiff still could not recover if the defendant offered subsequently, before any change in the condition of the parties or in the value of the stock, to return the same on payment of the amount loaned and that paid on account of assessments, with interest.

This charge was approved by the appellate court.

## SECTION 3.

ALTERING THE CONDITION OF THE CHATTEL.

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IN 1 Comyns's Digest, 221 (action upon the case upon trover), it is said: "If a man delivers the oats of another to B to be made oat-meal, and the owner afterwards prohibits him, but yet B makes the oat-meal, this is a conversion."

NOTE. — In *Holkins v. Fowler*, L. R. 7 H. L. 757, 768, Mr. Justice BLACKBURN commented on this passage as follows: "To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or suppose the plaintiffs in the case at your Lordships' Bar had, for some reason, brought the action against Micholls's men who assisted in turning this cotton into twist? [Micholls, cotton spinners, had purchased cotton belonging to the plaintiffs from one who had no authority to sell it.] . . . I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavour to answer it."

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## RICHARDSON v. ATKINSON.

1 Strange, 576. 1723.

THEY held that the drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole. ✓

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## McPHETERS v. PAGE.

83 Me. 234. 1891.

FOSTER, J. Trover to recover the value of one carcass and two saddles of deer.

It is admitted that the deer were lawfully killed by the plaintiffs and that they owned the carcass and saddles for which this suit is brought.

The only question involved is whether there has been a conversion of the property by the defendant.

The carcass and saddles were, during open season, put on board

the cars to be transported to Boston for sale. Upon their arrival at Bangor, they were seized by a constable and two police officers for some supposed violation of law on the part of the plaintiffs, in attempting to transport them out of the state. They were taken and carried by these officers to the defendant's meat market in the city, and there left with him. He knew the officers' possession came by seizure. The officers had no precept and procured none either against the property or the plaintiffs. They were not justified in seizing them, or in afterwards doing what they did with them. Nor have we any doubt that the acts of the defendant with reference to the property in question amounted to a conversion. The evidence is uncontradicted that he skinned the carcass and saddles, cut them into steaks and roasts, let one of the officers "have paper to do the pieces up to distribute them round to his friends," and sent a few of the orders out with his own team. This he admits. He used none of the meat himself; neither was any of the meat sold.

The defendant sets up no justification by his pleading. It would not avail him were he to do so with the facts before us. Notwithstanding he may have acted as the agent or servant of the officers in what he did, it furnishes him no legal justification. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrong-doer, the agent is a wrong-doer also." *Kimball v. Billings*, 55 Maine, 147, 151.

It is established as elementary law by well-settled principles, and a long line of decisions, that any distinct act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it in exclusion, or in defiance of, or inconsistent with, the owner's right, that in law is a conversion, whether it be for his own or another person's use. *Cooley on Torts*, 448; *Webber v. Davis*, 44 Maine, 147, 152; *Miller v. Baker*, 1 Met. 27; *Fernald v. Chase*, 37 Maine, 289. "He who interferes with my goods, and without any delivery by me, and without my consent, undertakes to dispose of them, as having the property, general or special, does it at his peril to answer me the value in trespass or trover." *Gibbs v. Chase*, 10 Mass. 125, 128.

In this case the defendant was more than a mere naked bailee. He exercised a dominion over the property destructive of it, and inconsistent with the plaintiffs' ownership. The fact that he was the servant of others who were themselves wrong-doers, and acted under their authority, can not avail him though he may have been ignorant of their want of title to the property in question. *Kimball v. Billings*, *supra*; *Coles v. Clark*, 3 Cush. 399, and cases there cited. *Hoffman v. Carow*, 22 Wend. 285; *Gilmore v. Newton*, 9 Allen, 171; *Freeman v. Underwood*, 66 Maine, 229, 233.

The stipulation of parties has settled the amount of damages to be recovered.

*Judgment for the plaintiffs for \$43.73, with interest thereon from the date of the writ.*

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MULGRAVE v. OGDEN.

Croke, Elizabeth, 219. 1591.

ACTION sur trover of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be motheaten; or if one finds a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, etc.; but for negligent keeping no law punisheth him.

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SIMMONS v. LILLYSTONE.

8 Exch. 431. 1853.

THE second count was in trover for the conversion of pieces of timber. Certain pieces of timber belonging to the plaintiff were on the defendant's land, embedded in the soil. The defendant directed his workmen to dig a saw-pit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them were afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining embedded in the soil.

PARKE, B. The next question, which relates to the count in trover, is, whether there was any evidence of a conversion. Now the evidence was, that the pieces of timber were cut in two by the defendant; that they were left embedded in the soil — not applied to the defendant's own use; — and that part of them were carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case, nothing is done but

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cutting the timber, and, by accident, it is washed away by the river — not purposely thrown by the defendant to be washed away; — consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise whether that conversion was not excused by the right which the defendant had to make the sawpit, and to cut the timber in making it, if he was not able to do it in any other way. But, without deciding that, we think that there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use, that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property. None of those alternatives are made out by the evidence, and consequently there ought to be a verdict for the defendant on the plea of not guilty to the count in trover.

NOTE. — *Philpott v. Kelley*, 3 Ad. & E. 106. The defendant had a pipe of wine belonging to the defendant. He bottled it, and this act was held not to be a conversion. LITTLEDALE, J., said (p. 114) that it was not a conversion “if done by the direction of the party depositing, or if done for the best, with a view to preservation.”

## SECTION 4.

## DISPOSING OF THE CHATTEL.

*A. Sale, or Pledge, by a Bailee.*

## STEVENS v. EAMES.

22 N.H. 568. 1851.

CERTAIN property was bailed to the defendant, and he mortgaged it, with other property, to secure his own debt.

EASTMAN, J. There is abundant evidence showing a conversion by Eames. An abuse of possession, originally legal, or a breach of trust under which property is placed in a defendant's hands, by disposing of it, is a conversion.

NOTE. — In *Haas v. Damon*, 9 Iowa, 589, the plaintiff had bailed property to the defendant to be sold; the defendant exchanged it for other property; and the court characterized this as a conversion. Similarly, in *Boyce v. Brockway*, 31 N.Y. 490, where an agent sold the property, after the lapse of the time within which he was authorized to sell. See the discussion of this matter in *Laverty v. Snethen*, 68 N.Y. 522, 526, *infra*.

## MULLINER v. FLORENCE.

L. R. 3 Q. B. D. 484.

ACTION for the detention and conversion of horses, carriages, and harness.

At the trial at the Warwickshire Summer Assizes, 1877, before POLLOCK, B., the following facts were given in evidence. The defendant kept an inn at Coventry, and at the end of September, 1876, one Bennett came to the defendant's inn and stayed there as a guest until the middle of January, 1877, when he quitted the inn. Bennett was received by the defendant as an ordinary guest, and at the time of his departure from the inn he owed the defendant 109*l.* for lodging, food, and entertainment. In November, 1876, a pair of horses, waggonette, and harness came to the defendant's inn for Bennett; he told the defendant that he had bought them from the plaintiff who lived at Leamington. The horses, waggonette, and harness were not



taken in at livery, but were received by the defendant as a part of the property of his guest Bennett. At the time when the latter quitted the inn, he was in debt to the defendant for the keep of these horses, and the defendant claimed on this account from him 22*l.* 10*s.* Bennett left the horses, waggonette, and harness behind him at the defendant's inn. It was afterwards ascertained that Bennett was a swindler, and that he had bought the horses from the plaintiff upon the terms that if they should not be paid for they should be returned to him free of expense. Bennett did not pay the price for the horses. The plaintiff demanded from the defendant possession of the horses, waggonette, and harness, and tendered to him a sum of 20*l.* for the keep of the horses; but the defendant refused to give up the horses, waggonette, and harness. The defendant sold the horses by auction for 73*l.*, but he retained possession of the waggonette and harness. Bennett was afterwards convicted of fraud, and sentenced to penal servitude. The defendant claimed to keep the proceeds of the sale, and also to retain the waggonette and harness, on account of the sums of 109*l.* and 22*l.* 10*s.*

Upon these facts the learned judge directed judgment to be entered for the defendant.

BRAMWELL, L.J. On the question whether the sale was wrongful I think the learned judge was wrong. The defendant, who had only a lien on the horses, was not justified in selling them, and he has therefore been guilty of a conversion, and that enables the plaintiff to maintain this action for the proceeds of the sale. The very notion of a lien is, that if the person who is entitled to the lien, for his own benefit parts with the chattel over which he claims to exercise it, he is guilty of a tortious act. He must not dispose of the chattel so as to give some one else a right of possession as against himself. The lien is the right of the creditor to retain the goods until the debt is paid. It is quite clear that the defendant could not use the horses, yet it is suggested that he can sell them and confer a title upon another person. Several cases were cited, but none of them are inconsistent with the present. Those mainly relied on were *Donald v. Suckling*, Law Rep. 1 Q. B. 585 and *Johnson v. Stear*, 15 C. B. (N.S.) 330; 33 L. J. (C. P.) 130. In the latter case it was no doubt held that the sale by the pledgee of an article pledged to him was tortious, and that the action could be maintained. But looking at the substance of the thing, and at the decision of *Halliday v. Holgate*, Law Rep. 3 Ex. 299, in all these cases the courts held that although the pledgee in repledging the article had exceeded what he had a right to do, yet inasmuch as there remained in the pledgee an interest, not put an end to by the unauthorized pledge, he could transfer the pledge to another person. In *Johnson v. Stear* it certainly was held to be a tortious conversion. In the other two cases it was held not to be so. What in substance those cases decided was, that as the interest un-

der the original pledge was not determined, the immediate right to the possession of the chattels was not re-vested in the pledgor so as to give him a right of action. Those cases, however, were cases between the pledgor and the pledgee, and have nothing whatever to do with the present case. The interest of the pledgee there could be assigned, but here the parting with the chattels subject to the lien destroyed it.

### MCCOMBIE v. DAVIES.

7 East, 5. 1805.

This action of trover for tobacco having gone to a second trial, in consequence of the opinion of the court delivered in Trinity term last, when it was considered that the defendant's taking an assignment of the tobacco in the King's warehouse by way of pledge from one Coddan, a broker, who had purchased it there in his own name for his principal, the plaintiff (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority), and the defendant's refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to Coddan his broker in 30*l.* on the balance of his account, and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by assignment from Coddan for a valuable consideration stood in his place and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered the 30*l.* ought to be nonsuited. Lord ELLENBOROUGH, C.J., however, being of opinion that the lien was personal, and could not be transferred by the tortious act of the broker pledging the goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.

The Solicitor-General now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground that the defendant who stood in the place of Coddan, and was entitled to avail himself of all the rights which Coddan had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of Coddan's claim upon them. And in answer to the case of *Daubigny v. Duval*, 5 Term Rep. 604 (which was suggested as establishing a contrary doctrine), he observed that Lord KENYON was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his lordship

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seemed to retain that opinion when the case was moved in court, though the rest of the Bench differed from him. But

Lord ELLENBOROUGH, C.J., said, that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession; yet it was quite clear that a lien could not be transferred by the tortious act of a broker pledging the goods of his principal, which he had no authority to do. That in *Daubigny v. Duval*, though Lord KENYON was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet after the rest of the court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, Assignees of Gard, v. Pym*, 1 East, 4, to have fully acceded to their opinion; for he there states that "the right of lien has never been carried further than while the goods continue in the possession of the party claiming it." And afterwards he says, "In the case of *Kinloch v. Craig*, 3 Term Rep. 119, afterwards in Dom. Proc. ib. 786, where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession: but the contrary was ruled by this court, and afterwards in the House of Lords."

His lordship then, after consulting with the other judges, declared that the rest of the court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case: and added, that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them *as his own*; and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien.

PER CURIAM,

*Rule refused.*

NOTE. — See Stat. 52 & 53 Vict., c. 45. There are Factors Acts in several of the United States.

## DOUGLAS v. CARPENTER.

17 N.Y. App. Div. 329. 1897.

WILLIAMS, J. The action was brought by a firm of bankers and stockbrokers, members of the Stock Exchange, in New York City, to recover the balance of an account growing out of speculative stock, bond and grain operations conducted by plaintiffs for defendant *on margin*. The account began October 11, 1888, and continued until December 1, 1893. The defendant, among other things, claimed that there had been conversion by the plaintiffs of certain securities belonging to the defendant by their having pledged the same, and that the defendant was entitled to damages for such conversion. There were other questions in the case, some of which have been argued before this court, but this is the important question and the only one which we think it necessary to determine. We need not detail the facts to show how this question was raised. There is no dispute but that it was in the case, was fairly raised, and that the referee decided it in favor of the plaintiffs, and if he was wrong the judgment must be reversed. The question may be briefly stated as follows: Were the plaintiffs guilty of a conversion of the defendant's securities by pledging them for the benefit of the plaintiffs' own business, mingling them with other securities, and obtaining loans thereon for a greater amount than the indebtedness of the defendant to the plaintiffs on account thereof, and without retaining in the plaintiffs' possession other securities of a like kind and amount?

There are some things about which there is no dispute. The relations of pledgor and pledgee existed between the defendant and the plaintiffs. The securities were the property of the defendant, and the plaintiffs had a lien thereon for the amount of their advances. The unauthorized sale of the securities by the plaintiffs would have been a conversion thereof. An unauthorized loan of the securities by the plaintiffs, with the understanding that the persons borrowing them might sell or dispose of them according to their pleasure, would have been a conversion thereof. Such sale or loan would not have been consistent with the general ownership and ultimate rights of the defendant. No custom, however general or long continued, could make such sale or loan legal, because it would be inconsistent with the contract between the parties and in derogation of the property rights of the defendant. The defendant had the ownership of the securities, but not the right of possession. His interest in the property consisted in his right of redemption. By payment or tender of the indebtedness the lien of the plaintiffs would have been discharged, and the defendant would have become entitled to the immediate restoration of his property. The plaintiffs might take title to the securities in their own name, and were not bound to retain or

deliver the identical securities purchased for the defendant. Their duty was to keep on hand, or under their control, either the securities of the defendant or a like kind and amount of securities, and to have them in such situation that the defendant, by paying the amount due by him thereon, could, at any time, obtain them. This was what the plaintiffs agreed to do, and so long as they did this, the fact that they used the securities while in their possession, awaiting redemption by the defendant, would not amount to a conversion thereof. These principles are well settled and are recognized by both parties. See *Markham v. Jaudon*, 41 N.Y. 235; *Baker v. Drake*, 66 id. 522; *Gruman v. Smith*, 81 id. 28; *Lawrence v. Maxwell*, 53 id. 19; *Capron v. Thompson*, 86 id. 418; *Taussig v. Hart*, 58 id. 429; *Caswell v. Putnam*, 120 id. 153; *Hopper v. Sage*, 112 id. 535; *Horton v. Morgan*, 19 id. 170; *Stewart v. Drake*, 46 id. 449, 453; *Levy v. Loeb*, 85 id. 365.

It would seem that the decision in *Caswell v. Putnam* (*supra*), that the general rule that a sale or loan constitutes a conversion of securities, is to be regarded as modified to the extent that the sale or loan of the identical securities of the pledgor will not be a conversion, provided the pledgee at all times keeps in his possession, or under his control, securities of like kind and amount as those sold or loaned. In this case we must consider that the pledges were made by plaintiffs without keeping in their possession securities of a like kind and amount, because the defendant offered to make this proof and the evidence was excluded. The pledges were, therefore, made of the defendant's securities, mixed and mingled with other securities, and for amounts larger than the indebtedness of the defendant to the plaintiffs, and no other securities of like kind and amount were kept in their place. The only question is, therefore, whether such pledges were conversions of the securities, as sales or loans of the securities would have been had the transactions been such sales or loans. It seems to us that all the reasons that operate to render sales or loans of the securities conversions are equally applicable to such pledges as were made by the plaintiffs of defendant's securities in this case. Any disposition of the defendant's securities by the plaintiffs which would deprive him of his right to immediate possession thereof, upon payment or tender of the indebtedness by him to the plaintiffs on account of such securities would amount to a conversion thereof. A sale or loan would do this, no securities of a like kind and amount being kept in their place, because the securities would be gone and could not be delivered to the defendant.

It would not do to say that the plaintiffs might go into the market and buy other securities of a like kind and amount on payment or tender being made by defendant, because the plaintiffs might not have the funds to purchase the new securities, and the only reliance the defendant would have would be the personal financial responsi-

bility and ability of the plaintiffs, whereas he had a right to rely upon the securities themselves, and if they were retained he could get them, whether the plaintiffs were financially responsible or not.

As said by RAPALLO, J., in *Taussig v. Hart*, *supra*, 430: "To allow a broker to sell his customer's stock without authority, and speculate upon replacing it at a lower price, would be encouraging speculations by agents at the risk of their principals, totally inadmissible under familiar rules. Should the stock rise largely in price after the broker had thus divested himself of all control over the shares which he had purchased on the order of his principal, the broker might be unable to replace the shares, and the principal would have no remedy except a personal claim against the broker. This clearly is not what is contemplated under an agreement to buy and carry stocks. The customer does not rely upon an engagement of the broker to procure and furnish the shares when required, but upon his actually purchasing and holding the number of shares ordered, *subject only to the payment of the purchase price.*"

It is not doubted but that the plaintiffs might lawfully have pledged the defendant's securities, by themselves, separate and apart from others, for an amount not exceeding the indebtedness to them by the defendant thereon. In such case the defendant would have been protected, because he could have gone to the pledgees and have obtained the securities by payment or tender of the amount of his indebtedness and nothing more (*Chapman v. Brooks*, 31 N.Y. 75); but mingling them with other securities and pledging them for an amount larger than the defendant's indebtedness would have placed them where the defendant could not have obtained them by a payment or tender of the amount of his indebtedness, and would have been illegal and unauthorized. *McNeil v. Tenth National Bank*, 46 N.Y. 325; *Schouler on Bailments* [1st ed.], 201. It will not do to say that plaintiffs *might* be able to get defendant's securities released from the pledges made by them, by paying up the whole or a part of the amount for which the pledges were made, and so be able to surrender them to defendant on payment or tender of the amount of his indebtedness. His doing this, like his purchasing other securities in the case of a sale or loan already referred to, would be dependent upon his having the funds to pay the amounts for which the pledges had been made or upon his ability to get such securities released, and the same reasoning is applicable to pledges as would apply to sales or loans under like circumstances. The referee based his decision upon this point upon the consideration that "all that the customer has a right to require is a delivery of his property on payment of the brokers' lien thereon, and the proof before me is that the plaintiffs at all times had control of the stocks and bonds bought and carried by them for the defendant, and were at all times able and

*ready to make delivery of them to the defendant on payment of the balance due on his account."*

If this statement were to be regarded as absolutely true, the judgment might be sustained upon such facts, but it must be remembered that the defendant offered to prove a different state of facts. The offer was to prove that instead of the securities being at all times under the control of the plaintiffs, so that they were at all times able and ready to deliver the same to the defendant on payment of his indebtedness, the securities were mingled with other securities, and were pledged to third parties for amounts larger than the indebtedness by defendant to the plaintiffs. This evidence was excluded. If it had been received and relied on, it would have appeared that the control of plaintiffs over the securities and their ability to deliver the same to the defendant would have rested, as we have before suggested, upon the personal ability of plaintiffs to discharge the amounts for which the pledges were made or otherwise obtain possession of the securities. If such pledges had been made, and the plaintiffs had absconded or become entirely insolvent, the defendant would not have been able to get possession of his securities by merely paying the indebtedness thereon by himself to the plaintiffs. We are unable in any view of the case to see how the pledges of the defendant's securities could be said to have been legal. It seems to us that they were illegal and were conversions of such securities.

The conclusion we have arrived at upon this point requires a reversal of the judgment and a new trial of the case. It is not necessary to consider the other questions raised on this appeal. The case is here determined largely upon the rejection of evidence offered, and when the defendant is permitted to give such evidence as he can, as to the nature and extent of the pledges alleged to have been made, the other questions arising in the case may need consideration.

The judgment appealed from should be reversed, and a new trial ordered before another referee, with costs to appellant to abide event.

VAN BRUNT, P.J., RUMSEY and PARKER, JJ., concurred; PATTERSON, J., concurred in result.

NOTE. — On the question whether a pledgee of stock may properly dispose of that stock, if he keep an equal number of other shares of such stock under his control, compare *Allen v. Dubois*, 117 Mich. 115.

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### JOHNSON v. STEAR.

15 C. B. N.S. 330. 1863.

ERLE, C.J., now delivered the judgment of the majority of the court: —

In trover by the assignee under the bankruptcy of one Cumming, the facts were that Cumming had deposited brandy lying in a dock with one Stear, by delivering to him the dock-warrant, and had agreed that Stear might sell, if the loan was not repaid on the 29th of January; that, on the 28th of January, Stear sold the brandy, and on the 29th handed over the dock-warrant to the vendees, who on the 30th took actual possession.

Upon these facts, the questions are, — first, was there a conversion? and, if yes, — secondly, what is the measure of damages?

To the first question our answer is in the affirmative. The wrongful sale on the 28th, followed on the 29th by the delivery of the dock-warrant in pursuance thereof, was, we think, a conversion. The defendant wrongfully assumed to be owner in selling; and, although the sale alone might not be a conversion, yet, by delivering over the dock-warrant to the vendees in pursuance of such sale, he interfered with the right which Cumming had of taking possession on the 29th if he repaid the loan; for which purpose the dock-warrant would have been an important instrument. We decide for the plaintiff on this ground: and it is not necessary to consider the other grounds on which he relied to prove a conversion. Then the second question arises.

The plaintiff contends that he is entitled to the full value of the goods sold by the defendant, without any deduction, on the ground that the interest of the defendant as bailee ceased when he made a wrongful sale, and that therefore he became liable to all the damages which a mere wrong-doer who had wilfully appropriated to himself the property of another without any right ought to pay. But we are of opinion that the plaintiff is not entitled to the full value of the goods. The deposit of the goods in question with the defendant to secure repayment of a loan to him on a given day, with a power to sell in case of default on that day, created an interest and a right of property in the goods which was more than a mere lien, and the wrongful act of the pawnee did not annihilate the contract between the parties nor the interest of the pawnee in the goods under that contract.

It is clear that the actual damage was merely nominal. The defendant by mistake delivered over the dock-warrant a few hours only before the sale and delivery by him would have been lawful; and by such premature delivery the plaintiff did not lose anything, as the bankrupt had no intention to redeem the pledge by paying the loan.

If the plaintiff's action had been for breach of contract in not keeping the pledge till the given day, he would have been entitled to be compensated for the loss he had really sustained, and no more: and that would be a nominal sum only. The plaintiff's action here is in name for the wrongful conversion; but, in substance, it is the same



cause of action; and the change of the form of pleading ought not in reason to affect the amount of compensation to be paid.

There is authority for holding, that, in measuring the damages to be paid to the pawnor by the pawnee for a wrongful conversion of the pledge, the interest of the pawnee in the pledge ought to be taken into the account. On this principle the damages were measured in *Chinery v. Viall*, 5 Hurlst. & N. 288. There, the defendant had sold sheep to the plaintiff; and, because there was delay in the payment of the price by the plaintiff, the defendant resold the sheep. For this wrong the court held that trover lay, and that the plaintiff was entitled to recover damages; but that, in measuring the amount of those damages, although the plaintiff was entitled to be indemnified against any loss he had really sustained by the resale, yet the defendant as an unpaid vendor had an interest in the sheep against the vendee under the contract of sale, and might deduct the price due to himself from the plaintiff, from the value of the sheep at the time of the conversion.

In Story on Bailments, § 315, it is said: "If the pawnor, in consequence of any default or conversion by the pawnee, has recovered back the pawn or its value, still the debt remains and is recoverable, unless in such prior action it has been deducted: and it seems that, by the common law, the pawnee in such action for the value has a right to have the amount of his debt recouped in damages." For this he cites *Jarvis v. Rogers*, 15 Mass. R. 389. The principle is also exemplified in *Brierly v. Kendall*, 17 Q.B. 937 (E. C. L. R. vol. 79). There, although the form of the security was a mortgage, and not a pledge; and although the action was trespass, and not trover; yet the substance of the transaction was in close analogy with the present case. There was a loan by the defendant to the plaintiff, secured by a bill of sale of the plaintiff's goods, in which was a reservation to the plaintiff of a right to the possession of the goods till he should make default in some payment. Before any default, the defendant took the goods from the plaintiff, and sold them. For this wrong he was liable in trespass: but the measure of damages was held to be, not the value of the goods, but the loss which the plaintiff had really sustained by being deprived of the possession. The wrongful act of the defendant did not annihilate his interest in the goods under the bill of sale; and such interest was to be considered in measuring the extent of the plaintiff's right to damages.

On these authorities we hold that the damages due to the plaintiff for the wrongful conversion of the pledge by the defendant, are to be measured by the loss he has really sustained; and that, in measuring those damages, the interest of the defendant in the pledge at the time of the conversion is to be taken into the account. It follows that the amount is merely nominal, and therefore that the verdict for the plaintiff should stand, with damages 40s.

WILLIAMS, J. I agree with the rest of the court that there was sufficient proof of a conversion; for, although the mere sale of the goods (according to *The Lancashire Wagon Company v. Fitzhugh*, 6 Hurlst. & N. 502) would have been insufficient, yet I think the handing over of the dock-warrant to the vendees before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was tantamount to a delivery. Not that the warrant is to be considered in the light of a symbol, according to the doctrine applied to cases of donations *mortis causa*; it is the means of coming at the possession of a thing which will not admit of *corporal delivery*. *Ward v. Turner*, 2 Ves. sen. 431; *Smith v. Smith*, 2 Stra. 295.

But I cannot agree with my Lord and my learned Brothers as to the other point; for, I think the damages ought to stand for the full value of the brandies. The general rule is indisputable, that the measure of damages in trover is the value of the property at the time of the conversion. To this rule there are admitted exceptions. There is the well-known case of a redelivery of the goods before action brought, which, though it cannot cure the conversion, yet will go in mitigation of damages. Another exception is to be found in cases where the plaintiff has only a partial interest in the thing converted. Thus, if one of several joint-tenants or tenants in common alone brings an action against a stranger, he can recover only the value of his share. So, if the plaintiff, though solely entitled to the possession of the thing converted, is entitled to an interest limited in duration, he can only recover damages proportionate to such limited interest, in an action against the person entitled to the residue of the property (though he may recover the full value in an action against a stranger). The case of *Brierly v. Kendall*, which my Lord has cited, is an example of this exception. There, the goods had been assigned by the plaintiff to the defendant by a deed the terms of which operated as a re-demise, and, since the defendant's quasi estate in remainder was not destroyed or forfeited by his conversion of the quasi particular estate, the plaintiff, as owner of that estate, was only entitled to recover damages in proportion to the value of it.

With respect, however, to liens, the rule, I apprehend, is well established, that, if a man having a lien on goods abuses it by wrongfully parting with them, the lien is annihilated, and the owner's right to possession revives, and he may recover their value in damages in an action of trover. With reference to this doctrine, it may be useful to refer to Story on Bailments. In § 325, that writer says: "The doctrine of the common law now established in England, after some diversity of opinion, is, that a factor having a lien on goods for advances or for a general balance, has no right to pledge the goods, and that, if he does pledge them, he conveys no title to the pledgee.

The effect of this doctrine is, in England, to deny to the pledgee any right in such a case to retain the goods even for the advances or balance due to the factor. In short, the transfer is deemed wholly tortious; so that the principal may sue for and recover the pledge, without making any allowance or deduction whatever for the debts due by him to the factor." After stating that the English legislature had at length interfered, the learned author continues, in § 326, "In America, the general doctrine that a factor cannot pledge the goods of his principal has been repeatedly recognised. But it does not appear as yet to have been carried to the extent of declaring the pledge altogether a tortious proceeding, so that the title is not good in the pledge even to the extent of the lien of the factor, or so that the principal may maintain an action against the pledgee without discharging the lien, or at least giving the pledgee *a right to recover the amount of the lien in the damages.*" But, in the 6th edition, by Mr. Bennett, it is added, "Later decisions have, however, fully settled the law, that a pledge by a factor of his principal's goods is wholly tortious, and the owner may recover the whole value of the pledgee, *without any deduction or recoupment for his claim against the factor.*" And I may mention that I have reason to believe this rule as to liens was acted upon a few days ago in the Court of Queen's Bench, *Siebel v. Springfield*, 9 Law T. N.S. 325.

But it is said that the maintenance of such a rule in respect of pledges is inconsistent with *Chinery v. Viall*, mentioned by my Lord. It seems to me, however, that the decision of that case does not interfere with the general rule as to damages in trover, but only establishes a further exception in the peculiar and somewhat anomalous case of an unpaid vendor, whose right in all cases has been deemed to exceed a lien: see Blackburn on Contracts, p. 320. I cannot, however, think that this exception can be properly extended to the case of a pledgee. An unpaid vendor has rights independent of and antecedent to his lien for the purchase-money. But the property of a pledgee is a mere creature of the transaction of bailment; and, if the bailment is terminated, must surely perish with it. Accordingly, it is said in Story on Bailments, § 327, "It has been intimated that there is, or may be, a distinction favourable to the pledgee, which does not apply, or may not apply, to a factor, since the latter has but a lien, whereas the former has a special property in the goods. It is not very easy to point out any substantial distinction between the case of a pledgee and the case of a factor. The latter holds the goods of his principal as a security and pledge for his advances and other dues. He has a special property in them, and may maintain an action for any violation of this possession, either by the principal or by a stranger. And he is generally treated, in judicial discussions, as in the condition of a pledgee." Again, in § 299. — "As possession is necessary to complete the title by pledge, so, by the common law,

the positive loss or the delivery back of the possession of the thing with the consent of the pledgee, *terminates his title*." And, further, in the same section, — "If the pledgee voluntarily, by his own act, places the pledge beyond his own power, as, by agreeing that it may be attached at the suit of a third person, that will amount to a waiver of his pledge." See *Whitaker v. Sumner*, 20 Pick. R. 399.

It should seem, then, that the bailment in the present case was terminated by the sale before the stipulated time; and, consequently, that the title of the plaintiff to the goods became as free as if the bailment had never taken place. If he had brought an action against an innocent vendee, the passage I have already cited from Story, § 325, demonstrates that he might have recovered the absolute value of the goods as damages. Why should he be in a worse condition in respect to an action against the pledgee who has violated the contract of pledge?

The true doctrine, as it seems to me, is, that, whenever the plaintiff could have resumed the property, if he could lay his hands on it, and could have rightfully held it when recovered as the full and absolute owner, he is entitled to recover the value of it as damages in the action of trover, which stands in the place of such resumption.

In the present case, I think it plain that the bailment having been terminated by the wrongful sale, the plaintiff might have resumed possession of the goods freed from the bailment, and might have held them rightfully when so resumed, as the absolute owner, against all the world. And I therefore think he ought to recover the full value of them in this action.

Nor can I see any injustice in the defendant's being thus remitted to his unsecured debt, because his lien has been forfeited by his own violation of the conditions on which it was created.

*Rule absolute to reduce the damages to 40s.*

NOTE. — In *Halliday v. Holgate*, L. R. 3 Exch. 299, on similar facts, the court held that not even nominal damages to the plaintiff were proper, as the plaintiff, not having paid his debt, did not have the immediate right to the possession of the chattel.

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### WHIPPLE v. DUTTON.

175 Mass. 365. 1900.

TORT, by the assignees in insolvency of the estate of the Beacon Cycle Manufacturing Company, for the conversion of five hundred bicycles. Trial in the Superior Court, without a jury, before LILLEY, J., who allowed a bill of exceptions, in substance as follows.

During the years 1892 and 1893 the Beacon Cycle Manufacturing

Company, a corporation, was engaged in Westborough in the manufacture and sale of bicycles. On June 26, 1893, the corporation entered into an agreement in writing with the defendants, which recited that the corporation had simultaneously delivered to the defendants five hundred "Nomad" bicycles for the purpose of securing money for its use as a corporation, and had executed and delivered therewith its three promissory notes, each for \$4,166.67, of even date, payable in thirty, sixty, and ninety days from date, the amount of the notes being made up by calling each of the bicycles of the value of \$25 each; that if the first note was paid, the defendants should release one third of the five hundred bicycles on being paid \$26 for each bicycle, the amount of the note being payment so far as the bicycles released, but if the note was not paid, then one third of the bicycles should be the absolute property of the defendants; that if the second note was paid, another one third of the bicycles should be released on the payment of \$27 a bicycle; and if the third note was paid, then the remainder of the bicycles should be released on the payment of \$28 each therefor, but if each note was not paid, then such one third of the bicycles should be the absolute property of the defendants; and that the whole number of bicycles might be released at the maturity of the first note "by paying \$26 for the whole number of the five hundred bicycles, the other two notes to be then given up."

The five hundred bicycles were not delivered to the defendants as recited in this agreement, and later the same day the corporation executed the following paper: "This instrument entitles Houghton & Dutton to the delivery to them of five hundred Nomad bicycles, the same being an accepted order for said number of machines to be delivered to them as they may request, as rapidly as one hundred and fifty per week; and this delivery is to be on the terms of our agreement with them dated June 26, 1893, and is hereby made a part thereof; said machines having been paid for in cash and agreements." Wheels to the number of three hundred and forty-four were delivered to the defendants in June and July, 1893, at various times, and as delivered the defendants advanced to or paid the corporation at the rate of \$25 a wheel. The balance of the five hundred wheels was never delivered, and the last of the three notes mentioned in the agreement was not used by the defendants or presented for payment. The corporation did not pay the notes referred to in the agreement at their maturity, and has never paid the same or any part thereof, but on October 7, 1893, was declared insolvent by the court of insolvency for the county of Worcester upon a petition by one of its creditors, and on October 31, 1893, the plaintiffs were duly appointed assignees of the insolvent estate.

On October 12, 1893, the defendants began to sell the bicycles received under the agreements, at private sale and singly or in small

lots, and all of them had been sold before June, 1894. The defendants did not serve any notice upon the corporation or upon the plaintiffs of an intention to sell; but the secretary of the corporation knew that sales were being made, and in general as to the price, and there was no evidence that he objected thereto. The sales were made openly at the large establishment of the defendants in Boston; and the bicycles were exhibited in the defendants' windows, where they were seen by an officer of the corporation.

It was not contended that the defendants did not use good judgment and diligence in effecting sales at favorable prices, the plaintiffs contending that the defendants had no right to sell at all.

In September, 1894, before the bringing of the writ, one of the plaintiffs called upon counsel for the defendants, to whom he had been referred by the defendants, and was informed that all the bicycles had been sold by the defendants, and that therefore they could not return them if demanded; and in reply to an inquiry whether a tender would be required, stated that it would do no good to make any demand or tender.

He further stated that upon failure of the corporation to pay its notes, he considered that the bicycles mentioned in the agreement became absolutely the property of the defendants; and that they recognized no rights of the assignees to recover the value of the goods. There was evidence that the bicycles were worth from \$50 to \$80 apiece.

The judge ruled, as requested by the defendants, that the plaintiffs were not entitled to recover, and found for the defendants; and the plaintiffs alleged exceptions.

MORTON, J. We assume, as the defendants contend, that the transactions of June 26 constituted a pledge of the bicycles received by the defendants, and that the subsequent sales as made by the defendants were unauthorized. But it does not follow that the plaintiffs are entitled to recover the value of the bicycles thus sold. The defendants had possession of the bicycles, and had a lien on them for sums lent to the bicycle company which were overdue and unpaid. They had a right to foreclose the pledge in any manner authorized by law. The plaintiffs contend that they foreclosed in a manner unauthorized by law. But the only effect, it seems to us, of the unauthorized sales by the defendants was to entitle the plaintiffs to recover any damages sustained thereby. The plaintiffs admit in substance that the defendants used good judgment and diligence in selling and that the sales were effected at favorable prices, and it does not appear that the proceeds were more than enough to pay what was due the defendants. Under such circumstances we fail to see how the plaintiffs have sustained any damage. It would be singular if, having a right to foreclose the pledge, the defendants should be held to have lost their lien and to be liable for the value of

the bicycles, because, without inflicting any damage thereby on the pledgor, they went the wrong way about the foreclosure, or claimed a greater right than they actually had. We do not think that such is the law. See *Dahill v. Booker*, 140 Mass. 308; *Farrar v. Paine*, 173 Mass. 58 and cases cited; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Johnson v. Stear*, 15 C. B. (N.S.) 330.

Other questions have been raised and argued which, in consequence of the views expressed above, it does not seem to us necessary to consider.

*Exceptions overruled.*

NOTE. — There are numerous authorities to the effect that a pledgee, by making an unauthorized transfer of the pledge, does not forfeit the debt owed by the pledgor, and that he may avail himself of such debt, in defending an action for the conversion of the pledge. See *Hallack Co. v. Gray*, 19 Col. 149; *Rosenzweig v. Frazer*, 82 Ind. 342; *Feige v. Burt*, 118 Mich. 243; *Woodworth v. Hascall*, 59 Neb. 124; *Wilson v. Little*, 2 N.Y. 443; *Neiler v. Kelly*, 69 Pa. 403.

## DIMOCK v. UNITED STATES NATIONAL BANK

55 N. J. L. 296. 1893.

THIS suit was brought upon a note, of which the following is a copy:

"\$50,000.

NEW YORK, April 15, 1884.

"Four months after date without grace, we promise to pay to the United States National Bank, or order, at its office in the City of New York, the sum of Fifty thousand 00-100 for value received, with interest at the rate of six per cent per annum payable — having deposited herewith, and pledged as collateral security to the holder thereof, the following property, viz.:

"200 shares Bankers & Merchants Tel. Stock.

"200 " Missouri Pacific R. R. Stock.

"200 " Delaware, Lac. & W. R. R. Stock.

" 15 " Central Iowa, Ill., Div. 1st Bonds, with authority to the holder hereof to sell the whole of said property, or any part thereof, or any substitute therefor, or any additions thereto, at any Broker's Board, in the City of New York, or at public or private sale in said city or elsewhere, at the option of such holder, on the non-performance of any of the promises herein contained, without notice of amount claimed to be due, without demand of payment, without advertisement and without notice of the time and place of sale, each and every of which is hereby expressly waived.

"It is agreed that in case of depreciation in the market value of

the property hereby pledged (which market value is now \$——) or which may hereafter be pledged for this loan, a payment shall be made on account of this loan upon the demand of the holder hereof, so that the said market value shall always be at least — per cent. more than the amount unpaid of this note and that in case of failure to make such payment, this note shall, at the option of the holder hereof, become due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and that the holder may immediately reimburse — by sale of the said property or any part thereof. In case the net proceeds arising from any sale hereunder, shall be less than the amount due hereon — promise to pay to the holder, forthwith after such sale, the amount of such deficiency with legal interest.

“It is further agreed, that any excess in the value of said collaterals, or surplus from the sale thereof beyond the amount due hereon, shall be applicable upon any other note or claim held by the holder hereof against — now due or to become due, or that may be hereafter contracted and that, if no other note or claim against — is so held, such surplus, after the payment of this note shall be returned to — or — assigns.

“It is further agreed that upon any sale by virtue hereof, the holder hereof may purchase the whole or any part of such property discharged from any right of redemption, which is hereby expressly released to the holder hereof, who shall retain a claim against the maker hereof for any deficiency arising upon such sale.

“A. W. DIMOCK & Co.”

The other facts appear in the opinion of the court.

On error to the Union Circuit.

The opinion of the court was delivered by

DEPUE, J. The note on which this suit was brought was in terms made payable in four months after date. It became due August 15th, 1884. This suit was brought May 21st, 1891. The suit was in all respects regular, and its regularity was in no wise dependent upon that paragraph in the pledge of securities which, upon certain conditions, accelerated the maturity of the note and made the money payable at a time earlier than that named on its face.

The securities pledged for the payment of the note were sold by the plaintiff on the 15th of May, 1884, and the note matured in the following August. From the sale the sum of \$45,456.26 was realized, leaving a balance due on the note of \$4,456.25, for which the plaintiff claimed judgment. The defendants' contention was that the sale in May was unauthorized and amounted in law to a conversion. In all other respects the sale was in conformity with the power. On the theory that the sale at the time in question was unauthorized, the defendants contended that they were entitled to have the value of the securities allowed to them at their highest market price between



the conversion and the time of the trial. The defendants gave in evidence the fact that in December, 1886, and April and May, 1887, these securities were worth in the market the sum of \$56,860 — sufficient to pay the plaintiff's note and leave a balance of \$6,860 due the defendants.

The defendants' claim was disallowed, and judgment given for the plaintiff for the sum of \$4,456.26, being the balance due on the note after crediting on it the proceeds of sale, with interest.

The case was tried by the judge, a jury being waived. A general exception was taken to his finding. Upon such an exception, if there be evidence to sustain the finding, the exception will not be sustained.

The plaintiff is a national bank located in the city of New York. The defendants, at the time of these transactions, were bankers and brokers in New York. The debt for which the note was given was a loan of \$50,000 to the defendants. The form of the contract pledging securities for the repayment of loans is such as is usual in that city. It must be assumed that the parties were aware of the effect of the terms of such contracts, and with the course of dealing in that market with securities pledged as security for loans.

By the first paragraph in the defendants' contract the plaintiff was authorized to sell the securities at any broker's board in the city of New York, or at public or private sale in said city or elsewhere, at its option, on the non-performance of any of the defendants' promises therein contained, without any notice of the time and place of sale. This contract was embodied in and made part of the note itself, and the promise to pay in the note was one of the promises on the non-payment of which a sale was authorized. The sale was made through a firm of brokers who were members of the stock exchange in New York City. There is no foundation in the evidence for complaint of the manner or fairness with which the sale was conducted.

The power of the plaintiff to sell the securities before the four months named in the note had expired, depends upon the construction and effect of the second paragraph of the contract. There was some discussion on the argument as to the right to fill the blanks in that paragraph. The evidence was not sufficient to justify the court in filling the blanks. The contract will be construed in the condition it was in when it was delivered to the plaintiff. In this paragraph it is provided that in case of a depreciation in the market value of the property pledged, the defendants should, on demand by the holder of the note, make a payment thereon, so that the market value of the securities should always be more than the amount of the debt; and that in case of the failure of the defendants to make such payment, the note should, at the payee's option, become due forthwith, and that the plaintiff might immediately reimburse itself by the sale of the property or any part thereof; and that in case the net proceeds of such sale should be less than the amount then due on the note, the

defendants should forthwith, after such sale, pay the amount of such deficiency, with interest.

The power to sell the securities before the maturity of the note, according to its terms, was made to depend upon the concurrence of two conditions — the depreciation in the market value of the property pledged, and the failure of the defendants, after demand, to make a payment on account of the loan, so that the market value of the securities pledged should be more than the amount due on the note.

The proof was that on the 6th of May, 1884, the firm of Grant, Ward & Co. failed, and the Marine Bank closed its doors. On the 14th the Metropolitan Bank closed its doors, and a number of leading bankers failed. These failures created a panic in the money market, and a great depreciation in the market value of all commercial securities. Early on the morning of the 15th, the defendants' embarrassments led them to an assignment for the benefit of their creditors. It fully appeared that at the commencement of business hours on the morning of May 15th, the securities pledged had so depreciated that their market value was considerably below the amount of the plaintiff's debt. Under a pledge with a power of sale such as exists in this case, the pledgee, unless restrained by other conditions in the contract of pledge, has a right to sell whenever the condition of the market makes it prudent for him to do so for the protection of his interests.

The other condition was that a demand should be made upon the defendants, and that upon such demand the defendants should pay on account of the note a sum sufficient to reduce the amount due below the market value the securities then had. The case shows that at the beginning of business hours on the morning of the 15th, two notices were served on the defendants. One of these notices was in a form, signed by the cashier of the bank, in these words: "I hereby call your loan of April 15, 1884, for \$50,000." This notice was plainly not a demand in conformity with the condition expressed in the contract. A depreciation in the market value of the securities pledged did not convert the loan, which was made on four months' time, into a call loan. That condition of affairs imposed upon the defendant the obligation, not to pay the note in full, but by a payment upon it to reduce the loan until the amount remaining due was under the market value of the securities. It appeared in evidence that the other notice served was "a demand for the payment on account of the loan to a degree corresponding to the depreciation of the securities." Neither the original notice nor a copy was produced. The witness who testified upon this subject was not able to state the amount of the depreciation, but he added that such depreciation was known to both the borrower and lender.

The object of a demand in a contract of this sort is to give the

party an opportunity to comply with the terms of his contract and preserve his securities from sale before the expiration of the time for which the loan was negotiated; and it would be reasonable that in making the demand the party, before he is put in default, should have been made aware of the extent of the depreciation, approximately, at least, and the sum required to be paid to save his rights should be specified. If the case rested solely on the sufficiency of the demand made, I should have some hesitation in sustaining this judgment.

Assuming that the sale of the securities in May was unauthorized, it was a conversion of the property, though the sale was made in good faith. Nevertheless, the judge's finding and the rule of damages applied were correct.

The general rule is, that the measure of damages for conversion is the value of the property at the time of the conversion. This rule has been modified with respect to the conversion of stocks and bonds, commercial securities vendible in the market, the market value of which is liable to frequent and great fluctuations caused by the depression and inflation of prices in the market.

In *Markham v. Jaudon*, 41 N.Y. 235, the Court of Appeals held that as between a customer and his broker, holding stock purchased for the former, which had been pledged as security for advances made in the purchase, the measure of damages for the conversion by an unauthorized sale was the highest market price between the time of the conversion and the trial. Relying upon this case, the defendants put in evidence no proof of value except the market value in December, 1886, and April and May, 1887. But *Markham v. Jaudon* has been overruled by a series of cases in the New York courts, and the rule adopted that in such cases the principal may disaffirm the sale, and that the advance in the market price from the time of sale up to a reasonable time to replace it, after notice of the sale, was the proper measure of damages. *Baker v. Drake*, 53 N.Y. 211; s. c. 66 Id. 518; *Gruman v. Smith*, 81 Id. 25; *Colt v. Owens*, 90 Id. 368. These decisions were made in cases where the transactions were dealings between the customer and broker in the purchase and sale of stocks on a margin. Subsequently, the same rule was applied where the owner of stock, for which he had paid full value and which he held as an investment, put it in the hands of a broker as collateral security for the debt of a third person, upon condition that it should not be sold for six months, the stock having been sold without the owner's authority before the expiration of that time. Under the decisions of the New York courts, reasonable time, where the facts are undisputed, is a question of law for the court. *Wright v. Bank of Metropolis*, 110 N.Y. 237. In *Colt v. Owens*, 90 N.Y. 368, thirty days after the sale and notice of it was regarded as reasonable time. The rule of the highest intermediate value between the time of the conversion

and the time of the trial has been rejected in the Supreme Court of the United States as the proper measure of damages, and the rule that the highest intermediate value between the time of the conversion and a reasonable time after the owner has received notice of it, was adopted as the correct view of the law, for the reason, as expressed by Mr. Justice BRADLEY, that more transactions of this kind arise in the State of New York than in all other parts of the country, and that the New York rule, as finally settled by its Court of Appeals, has the most reason in its favor. *Gallagher v. Jones*, 129 U.S. 193.

The principle upon which this doctrine rests is the consideration that the general rule that, in an action for a conversion, the market value of the property at the time of the conversion would afford an inadequate remedy, or rather no remedy at all, for the real injury, which consisted in the wrongful sale of property of a fluctuating value at an unfavorable time, chosen by the broker himself. Hence, the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damages. As was said by Mr. Justice BRADLEY in *Gallagher v. Jones*: "A reasonable time after the wrongful act complained of is to be allowed to the party injured to place himself in the position he would have been in had not his rights been invaded." The general rule that the market value at the time of the conversion is the measure of damages, being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be attained. In England the market value at the time of the trial appears to be the measure of damages. *Owen v. Routh*, 14 C. B. 327. In some of the sister states the rule of the highest intermediate price before the trial has been adopted. In New York and in most of the sister states, as well as in the Supreme Court of the United States, the formula which has been called the New York rule has been adopted, and is the rule which will accomplish the most complete justice in the ordinary transactions between the broker and his customer dealing in stocks when an unauthorized sale is the act of conversion. In such cases the customer has a choice of remedies. He may claim the benefit of the sale and take the proceeds; he may require the broker to replace the stock, or replace it himself and charge the broker for the loss, or he may recover the advance in the market price up to a reasonable time within which to replace it after notice of the sale. Cook, Stocks, § 460. But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day, another element enters into the consideration of the compensation to be awarded to the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment it is the duty of the pledgee to keep the securi-

ties in hand at all times ready to be delivered to the pledgor on the payment of the debt. Cook, Stocks, §§ 469, 471. An unauthorized sale before the debt matures is a conversion for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated and the market with a downward tendency; the market may revive and prices be enhanced before the debt matures. Under such circumstances a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt, and recover as damages the market value of the securities as of that time, would commend itself in reason and justice. As applied to the facts of this case, this rule would be eminently just. The plaintiff in good faith sold the securities in the manner authorized by the contract of pledge;

of duty was in selling at an unauthorized time. The debt was paid or tendered at maturity, and if the plaintiff had held and sold it at that time the sale would have been strictly in accordance with the power. If the defendants lost anything by the unauthorized sale, they would be recompensed for that loss by the award of damages equivalent to the market value of the securities at the time the debt became due. Tested by either of these standards the proper credit was allowed, the proof being that the market value of the securities was less when the note matured than when it was sold. No evidence of an increased price prior to 1886, was produced.

The judgment of the judge should be affirmed on the ground, also, that the sale was consented to and ratified by the defendants.

The defendants served on the morning of May 15th informed the plaintiff that the securities pledged had, in the plaintiff's estimation,

depreciated in market value, and that the contingency provided for in this part of the contract had happened, and also plainly indicated the purpose on the part of the plaintiff to avail itself of the right which, under those circumstances, would accrue under the contract. Immediately after the sale was made, the defendants had notice of the fact of sale, and, very shortly after, of the amount realized therefrom. No objection was made to the sale or the amount realized. On June 4th, 1884, the defendants filed a schedule of their indebtedness under their assignment. This schedule was verified by the oaths of the defendants, that it contained a true account of their creditors and of the sum owing to each, and also a statement of any existing collateral or other security for the payment of such debt. In this statement the plaintiff was put down as a creditor for the sum of \$4,737.50, which was about the amount due the plaintiff after the proceeds were applied to the debt; and to this specification of the existing debt due the plaintiff was appended a statement that, for the payment of this debt, there was no existing collateral or other secur-

ity. In September, 1885, the defendants caused to be presented to the plaintiff a composition agreement, with a view to a compromise with their creditors, in which the debt due the plaintiff was stated to be the sum of \$5,118.87, figures which represented approximately the net amount due the plaintiff on the note after applying thereon the proceeds of the sale of the securities, with interest. This agreement was signed by the plaintiff, but the project fell through, the defendants being unable to effect a compromise with all their creditors.

The defendants had the election either to ratify the sale and claim the benefit of it, or repudiate it and hold the plaintiff in damages. The act of the defendants in applying the proceeds of the sale as a credit on the plaintiff's note, is so positive and emphatic an act of ratification and adoption that it cannot be retracted.

The case was properly decided at the trial, and the judgment should be affirmed.

NOTE. — There are numerous authorities to the effect that the pledgee, after making an unauthorized transfer of the pledge, may sue for the amount of the debt owed him by the pledgor, less proper damages for the conversion of the pledge. See *Waring v. Gaskill*, 95 Ga. 731; *Upham v. Barbour*, 65 Minn. 364; *Richardson v. Ashby*, 132 Mo. 238; *Minor v. Beveridge*, 141 N.Y. 399; *Ainsworth v. Bowen*, 9 Wis. 348; *Rush v. First National Bank*, 71 Fed. 102.

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### SPROUL v. SLOAN.

241 Pa. 284. 1913.

OPINION BY MR. JUSTICE BROWN, May 28, 1913:

Henry Sproul & Company, stock brokers, who were engaged in business in the City of Pittsburgh, purchased for John Sloan, the appellee, in May, June and August, 1907, fifteen hundred shares of the capital stock of the United Copper Company. This stock was purchased at prices varying from \$61.50 to \$54 per share, and the brokers agreed to carry it for appellee on a margin of \$20 per share, which he deposited with them. As this stock was purchased from time to time the brokers mingled it with other securities under their control, and pledged them to a trust company and bankers as collateral for indebtedness of their own amounting to more than a million and a half dollars. This was without the authority or knowledge of Sloan. In April, 1908, Sproul & Company sold, at \$6.25 per share, the stock which they had purchased for the appellee, but which he refused to pay for and take off their hands; and, after crediting him with the proceeds, the margins deposited and the dividends received on the stock, this suit was brought to recover the balance alleged

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to be due, amounting to \$34,214.51, with interest from the date of the sale of the stock. A verdict was directed for the defendant, for the reason, as stated in the opinion of the court denying a new trial and judgment for the plaintiffs n. o. v., that, as Sproul & Company had converted to their own use the stock purchased for the appellee, by hypothecating it for their own indebtedness, they had broken their contract with him and were in no position to demand performance by him. As an authority for so holding, the learned trial judge cited and relied upon *Gillett v. Whiting*, 120 N.Y. 402. What was there said sustained him, though it was overlooked that subsequently the court of appeals held that the remarks in that case, as to the effect of a broker's conversion of his customer's securities upon his claim against the latter, were upon a question which was not before the court and were, therefore, to be regarded as mere *obiter dicta*, in conflict with the settled law of the state. *Minor v. Beveridge*, 141 N.Y. 399. It is not necessary for us to review the New York cases cited by counsel for appellant in support of their contention that the plaintiff below ought to have recovered, for we are of opinion that the view entertained by the court below was the correct one, without regard to the particular authority upon which it seems to have relied.

When Sproul & Company purchased the fifteen hundred shares of stock the legal title to it vested in Sloan, subject to the payment of the balance due by him for commissions and advances made by them. He became the pledgor and they the pledgees of the stock. *Learock v. Paxson*, 208 Pa. 602; *Barbour v. Sproul*, 239 Pa. 171. Sproul & Company might have used the stock in making a specific loan for the purpose of enabling them to carry the stock for the appellee, but, when they used it for any other purpose, they made an improper use of it, and when they pledged it, with other securities under their control, for their own indebtedness, they unlawfully converted it to their own use. *Douglass v. Carpenter*, 17 N.Y. App. Div. 329; *Strickland v. Magoun*, 119 N.Y. App. Div. 113, and 190 N.Y. 545; *German Savings Bank v. Renshaw*, 78 Md. 475. "One to whom stock has been pledged for a loan has full power to hypothecate it so long as the original pledgor may obtain possession of it upon payment of his debt; but if it has been mingled with the other securities of the pledgee, or has been rehypothecated by him to secure a different or larger debt than that for which it was pledged to him, or if the collaterals have been transferred, but the obligation they were given to secure retained, or if it has been in any way placed beyond the control of the pledgee, this is a conversion." *Vide* authorities cited in support of this in 31 Cyc. 837.

But it is earnestly contended by learned counsel for the appellant that inasmuch as Sloan suffered no damage by the brokers' conversion of his stock, he ought not to be permitted to defeat their

Decision  
upon merits  
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later  
be remitted

claim. This begs the question, for the moment the stock was converted by the brokers to their own use, the customer was damaged, and the measure of his damages was the highest price of the stock between the date of the conversion and that of the trial of a suit brought by the customer for the unlawful conversion. *Leacock v. Parson, supra.* From this there would, of course, have to be deducted the balance of the purchase money due the brokers. "The pledgee of stock cannot legally part with the possession of the stock by a sale or repledge of it, except as he transfers the debt which the stock secures. If he does so he is guilty of a conversion. . . . Even where, apparently, the pledgor would not be injured by the pledgee's separating the stock from the debt and transferring the stock pledged as collateral security, yet the law rigidly protects the interests of the debtor and pledgor, and will not compel him to submit to the danger of such transfers by the pledgee. There may, of course, be an express contract or understanding to the contrary." Cook on Corporations (6th Ed.), sec. 471.

The contract of Sproul & Company, which the appellants, through their receiver, would enforce against Sloan, was one to hold the stock for him until he paid the balance of the purchase money and demanded delivery of the securities, and in the interval they had no right to repledge the stock except for the debt which it secured. Instead of performing their contract with Sloan, the brokers made use of his property as if it was a part of their own capital, to enable them to make enormous loans, not, however, for the purpose of carrying his stock, but that they might continue to carry on their business as stock brokers. They treated his stock as their own, and the moment they did so without his authority, they placed him in jeopardy. After thus having broken their contract with him, why should they be permitted to demand performance by him? He was in entire ignorance, until a short time before the trial, that his brokers had converted his stock to their own use, and as soon as he learned what they had done, he promptly repudiated his contract with them. This was his undoubted right. The tender of the stock to him before it was sold is immaterial, for, at the time of the tender, the contract had been broken by the brokers, and, therefore, neither they nor their receiver could thereafter call for performance by their customer. It was for this reason that the learned trial judge directed the verdict for the defendant, and no sufficient answer has been given to it on this appeal. Nothing is to be found in any of our cases in conflict with the view of the court below. The main reliance of counsel for appellant seems to be placed on *Wynkoop v. Seal*, 64 Pa. 361. In that case the broker bought stock for a customer under a special contract, by the terms of which the customer was to have thirty days' credit in paying for it, and the title to it did not pass at the time of the purchase from the seller. In addition to this, the writer finds



from an examination of the paper books in the case that it did not appear that the broker had hypothecated the stock for any other indebtedness than that of his own customer.

The unauthorized pledging by a broker of his customer's securities places the latter in jeopardy, and the only safe and sound rule, in the absence of authority from the customer to pledge them as they were pledged in the case now before us, is that the broker pledges them at the peril of forfeiture of his right to call upon his customer for performance. It was contended in the court below that what Sproul & Company did was a common usage among brokers, whose business would be seriously interfered with if they were forbidden to repledge securities of their customers. As to this the learned trial judge well said: "Such a usage can never be shown, if it be in contravention of a well-established rule of law. It is a rule of law in Pennsylvania that the relation between a broker and his customer with respect to stocks purchased upon margin is that of pledgor and pledgee. To permit the broker to use the stock as capital in his own business is to shift the risk of his business upon his customers, a thing never contemplated in the contract. Such a usage, if it exists, is unreasonable: 'Malus usus abolendus est.'"

The assignments of error are overruled and the judgment is affirmed.

NOTE. — The unauthorized repledge was made, apparently, at or about the time of the purchase of the stock. If, therefore, the pledgee were charged with the value of the stock at that time, such charge would exceed the debt owed by the pledgor (as he had deposited a margin). The pledgor seems to have made no affirmative claim.

It is submitted that there was no occasion for the court to lay down a rule that an unauthorized transfer of the pledge forfeits the right *in personam* to which the pledge was security. Cf. *Whipple v. Dutton*, and *Dimock v. United States Bank*, *supra*, and the cases in the notes thereto.

A tortious transfer by a mere lienholder does not work a forfeiture of his debt.

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### TALTY v. FREEDMAN'S TRUST COMPANY.

93 U.S. 321. 1876.

ERROR to the Supreme Court of the District of Columbia.

This was replevin by the plaintiff to recover a collateral security pledged to one Kendig, a broker, and by him sold to the defendant. Under the instructions of the court below, the jury found a verdict

for the defendant; judgment was rendered thereon, and the plaintiff sued out this writ of error. The facts are fully set forth in the opinion of the court.

MR. JUSTICE SWAYNE delivered the opinion of the court.

This was an action of replevin, prosecuted by the plaintiff in error. The judgment was against him. The bill of exceptions discloses all the evidence given by both parties. The facts lie within a narrow compass, and, except as to one point, which in our view is of no consequence in this case, there is no disagreement between them.

Talty had a claim against the city of Washington for work and materials, amounting to \$6,096.75. He submitted it to the proper authority, and received the usual voucher. On the 4th of January, 1872, the claim was approved by the commissioners of audit, and a certificate to that effect was given to him. On the 6th of that month he employed Kendig, a broker, to negotiate a loan for him. With that view he placed in Kendig's hands his own note for \$3,000, having sixty days to run, with interest at the rate of ten per cent per annum, payable to his own order, and indorsed by him in blank. He also placed in the hands of Kendig to be used as collateral, his claim against the city, indorsed in blank also. The same day Kendig negotiated the loan and paid Talty the amount of the note, less the discount. Kendig sold the claim against the city to the defendant for ninety-six cents on the dollar. The money was paid to him. The purchase was made in good faith, and without notice of any right or claim on the part of Talty. With the proceeds of this sale Kendig took up the note. A few days before its maturity Talty called on Kendig and offered to pay the note, and demanded back the collateral. Kendig declined to accede to the proposition. He insisted that the understanding between him and Talty was that he was to receive no commission for negotiating the loan, but that he was to have instead the right to sell or take the claim against the city, if he chose to do so, at ninety cents on the dollar. He offered to pay Talty for the claim, making the computation at that rate, and deducting the amount of the note. This Talty refused, and insisted that Kendig had no authority with respect to the claim but to sell, in the event of default in the payment of the note at maturity. Each party testified accordingly. Subsequently, and after the maturity of the note, Talty demanded from the defendant in error the vouchers relating to the claim. The defendant refused to give them up, and this suit was thereupon instituted. The marshal took them under the writ of replevin, and delivered them to the plaintiff.

No tender was made by Talty to the defendant in error, nor to Kendig, and nothing was said by him upon the subject of paying his note to either, except the offer to Kendig, as before stated.

After receiving back the collateral, Talty was paid the full amount of it by the commissioners of the sinking fund of the city. The only

dispute between the parties as to the facts was that in relation to the authority of Kendig touching the claim.

Upon this state of the evidence the court instructed the jury to find for the defendant, and to assess the damages at the value of the claim. This was done, and judgment was entered upon the verdict. The instruction was excepted to.

Before entering upon the examination of the merits of the controversy, it may be well to consider for a moment the situation of the several parties. Talty has received and holds the proceeds of his note and the full amount of the collateral. Kendig holds the note and the amount of the collateral, less four per cent. The defendant in error, the *bona fide* purchaser of the claim, is out of pocket the amount paid for it to Kendig, and has the burden of this litigation and the security afforded by the replevin bond of Talty.

The question to be determined is, whether a tender to the defendant in error by Talty of the amount due on his note before bringing this suit was indispensable to entitle him to recover.

Kendig was not a factor with a mere lien. He was a pledgee. The collateral was placed in his hands to secure the payment of the note. It was admitted by Talty that Kendig was authorized to sell it if the note were not paid at maturity. Kendig had a special property in the collateral. He was a pawnee for the purposes of the pledge. Judge Story says (Bailm. sects. 324-327), "The pawnee may by the common law deliver over the pawn to a stranger for safe custody without consideration; or he may sell or assign all his interest in the pawn; or he may convey the same interest conditionally, by way of pawn, to another person, without in either case destroying or invalidating his security. But if the pawnee should undertake to pledge the property (not being negotiable securities) for a debt beyond his own, or to make a transfer thereof as if he were the actual owner, it is clear that in such case he would be guilty of a breach of trust, and his creditor would acquire no title beyond that held by the pawnee."

"Whatever doubt may be indulged in, in the case of a mere factor, it has been decided, in the case of a strict pledge, that, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

Numerous authorities are cited in support of these propositions. The subject as to the point last mentioned was learnedly examined in *Jarvis's Adm. v. Rodgers*, 15 Mass. 369. That was the case of a re-pledge by the first pledgee. The rule of the text as to the rights of the sub-pledgee was distinctly affirmed.

The case of *Lewis v. Mott*, 36 N.Y. 395, was in some of its leading points strikingly like the case before us. There, Brown had placed certain collaterals in the hands of Howe to secure the payment of two promissory notes of Brown held by Howe; Howe sold the notes and collaterals to Varnum; Brown offered to pay Varnum the amount

of the notes, and demanded the collaterals; Varnum refused to give them up, and Brown sued for them. The court said, "It must be conceded that Varnum, by the purchase of those securities from Howe, acquired at least the lien and interest of Howe, whatever that may have been; and the plaintiff's assignee, to have entitled himself to a redelivery of these securities, must have tendered the amount of the lien. There was simply an offer to pay Varnum the amount due upon these notes. It was unattended with any tender of the amount due, and was insufficient to extinguish the lien and thus entitle Brown to the return of the notes. . . . The offer to pay is not the equivalent for an actual tender. *Bateman v. Pool*, 15 Wend. 637; *Strong v. Black*, 46 Barb. 225; *Edmonson v. McLeod*, 16 N.Y. 543." See also *Baldwin v. Ely*, 9 How. 580; *Merchants' Bank v. The State Bank*, 10 Wall. 604.

The English law is the same. In *Donald v. Suckling*, Law Rep. 1 Q. B. 585, the case was this: A. deposited debentures with B. as security for the payment of a bill indorsed by A. and discounted by B. It was agreed, that, if the bill was not paid when due, B. might sell or otherwise dispose of the debentures. Before the maturity of the bill, B. deposited the debentures with C., to be held as security for a loan by him to B. larger than the amount of the bill. The bill was dishonored; and, while it was unpaid, A. sued C. in detinue for the debentures. It was held that A. could not maintain the suit without having paid or tendered to C. the amount of the bill. The case was elaborately considered by the court. See also *Moore v. Conham*, Owen, 123; *Ratcliffe v. Davis*, Yelv. 178; *Johnson v. Cumming*, Scott's C. B. N. s. 331.

A tender to the second pledgee of the amount due from the first pledgor to the first pledgee extinguishes *ipso facto* the title of the second pledgee; but that there can be no recovery against him without tender of payment is equally well settled. *Donald v. Suckling*, *supra*; *Jarvis's Adm. v. Rodgers*, *supra*; s. c. 13 Mass. 105.

But it is suggested that the note was in the hands of Kendig, and that Talty could not, therefore, safely pay the amount due upon it to the holder of the collateral. The like fact existed in *Donald v. Suckling*. It is not adverted to in the arguments of counsel, nor in the opinions of the judges in that case. It could not, therefore, have been regarded by either as of any significance. The answer here to the objection is obvious. The note, a few days before its maturity, was in the hands of Kendig. There being no proof to the contrary, it is to be presumed to have remained there. This suit was commenced after it matured. Talty might then have paid the amount due upon it to the defendant in error, and could thereupon have defended successfully in a suit on the note, whether brought by Kendig or any indorsee taking it after due. He might also, after making the tender, have filed his bill in equity, making Kendig and the savings-

bank defendants, and thus have settled the rights of all the parties in that litigation. Having sued at law without making the tender, it is clear he was not entitled to recover.

The instruction given by the court to the jury was, therefore, correct.

The proceeding and judgment were according to the local law regulating the action of replevin in the District of Columbia.

In the discussion here our attention was called only to the question of tender: nothing was said as to the rule of damages laid down by the court below.

There is another question arising upon the record, and that is, whether the defendant in error, being a *bona fide* purchaser, did not, under the circumstances, acquire the absolute ownership of the claim. Story on Agency, sect. 127; *Addis v. Baker*, 2 Anst. 229; *McNiel v. The Tenth National Bank*, 46 N.Y. 325; *Fatman v. Lobach*, 1 Duer, 354; *Weirick v. The Mahoning County Bank*, 16 Ohio, 297; *Fullerton v. Sturgess*, 4 Ohio St. 529.

But as the point has not been argued, we express no opinion upon the subject.

*Judgment affirmed.*

NOTE. — Other authorities to the effect that a tortious transfer by the pledgee gives the assignee such rights as the pledgee might properly have assigned are *Williams v. Ashe*, 111 Cal. 180; *Arsdale v. Joiner*, 44 Ga. 173; *Belden v. Perkins*, 78 Ill. 449; *Lewis v. Mott*, 36 N.Y. 395.

*B. Misdelivery by a Bailee.*

## HALL v. BOSTON CORPORATION.

14 All. (Mass.) 439. 1867.

FOSTER, J. The plaintiffs purchased and paid for fifty barrels of flour, and received a bill of sale from Clap & Brother, together with an order by them upon the defendant corporation to deliver that number of barrels. The defendants had at that time in their freight house a larger number belonging to Clap & Brother. The order was presented to the proper clerk of the railroad corporation by the teamster of the plaintiffs, who gave a receipt for fifty barrels, and received in return "a flour check" or order upon the clerk whose business it was to deliver such freight, for the same number in favor of the plaintiffs. This flour check or order was presented to the delivery clerk and left in his possession. Under it, he delivered to the plaintiffs twenty-two barrels of flour and indorsed them on the check or order. All these proceedings were in conformity with the usual course of such business, as recognized and permitted by the officers of the railroad corporation. But the remaining twenty-eight barrels were never in fact received by the plaintiffs, but were by mistake delivered to some unauthorized stranger by the delivery clerk. The facts disclose a sufficient selection and separation of the twenty-eight barrels as the property of the plaintiffs. The vendors ordered their delivery; the corporation by its agents accepted the order and agreed to deliver the flour. It was their duty to select the barrels to be delivered to the plaintiffs; and they necessarily made an actual selection and separation of twenty-eight barrels under the order before the misdelivery to the stranger, otherwise they could not have committed the mistake and indorsed the amount wrongly delivered on the plaintiffs' check. These proceedings were quite sufficient to vest in the plaintiffs the title to the twenty-eight barrels now in controversy. Even without the misdelivery, the effect of the vendor's order, when accepted by the parties who had the custody of the whole property, and were to select out of the whole the portion to be delivered, under the circumstances and according to the usual course of business, would have transferred the property in twenty-eight barrels to the plaintiffs, as against the creditors of the vendor, and so as to subject the vendees to the loss in case of fire. *Cushing v. Breed*, 14 Allen (Mass.) 376.

The plaintiffs have therefore a property and right of possession sufficient to maintain the present action.

The remaining question is, Are the defendants liable for a conver-

sion of the property? It is insisted on their behalf that this depends upon the amount of care they were bound to exercise, and the degree of negligence of which they were guilty. But this is an erroneous view of the law. A misdelivery of property by any bailee to a person unauthorized by the true owner is of itself a conversion, rendering the bailee liable in trover, without regard to the question of due care or degree of negligence. This is a well-established legal principle, applicable to every description of bailment. The action of trover is not maintained by proof of negligence, but only of misfeasance amounting to a conversion. And a delivery to an unauthorized person is as much a conversion as would be a sale of the property, or an appropriation of it to the bailee's own use. In such cases neither a sincere and apparently well-founded belief that the tortious act was right, nor the exercise of any degree of care, constitutes a defence even to a gratuitous bailee. *Lichtenhein v. Boston & Providence Railroad*, 11 Cush. 70; *Polley v. Lenox Iron Works*, 2 Allen, 182; *Lawrence v. Simons*, 4 Barb. 354; *Esmay v. Fanning*, 9 Barb. 176. The question whether the defendants were warehousemen bound to exercise ordinary care, or gratuitous bailees liable only for gross negligence, is therefore wholly immaterial.

Furthermore, when the freight was received into the depot, the railroad corporation became liable as warehousemen. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263. The point that the owners of the property failed to remove it within a reasonable time does not appear by the exceptions to have been raised at the trial. The mere fact of a sale by the original owners to the plaintiffs would not change the character of the bailment and diminish the responsibility of the warehousemen. The effect of an unreasonable delay by the owner to remove the property upon the liability of a railroad which has freight on hand ready to be delivered might under some circumstances require consideration. But in the present case no such question arises.

*Exceptions overruled.*

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### LAVERTY v. SNETHEN.

68 N.Y. 522. 1877.

CHURCH, CH.J. The defendant received a promissory note from the plaintiff made by a third person and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation, and the note to be returned the next day or the avails thereof. The plaintiff testified in substance that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it dis-

counted, and return the money to defendant, and he took away the note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available.

Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient.

The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal, is an action of assumpsit or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. Bouv. Law Dict., title Conversion.

SAVAGE, CH.J., in *Spencer v. Blackman*, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods."

In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury), not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had the right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion, and the authorities I think sustain this conclusion, by a



decided weight of adjudication. A leading case is *Syeds v. Hay*, 4 T. R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them and paying the wharfage. BULLER, J., said: "If one man who is intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this State as good law, and has never to my knowledge been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed. In *Spencer v. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution not against the owner, and it was held to be a conversion. SAVAGE, CH. J., said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 103. So, when a factor in Buffalo was directed to sell wheat at a specified price on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that in legal effect it was a conversion. *Scott v. Rogers*, 31 N.Y. 676; see, also, Addison on Torts, 310, and cases there cited. The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson*, 3 Taunt. 117, and *Sarjeant v. Blunt*, 16 J. R. 73, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the broker or agent did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property, a distinction which, in a practical sense, may seem technical, but it is founded probably upon the distinction between an unauthorized interference with the property itself, and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case SPENCER, J., distinguished it from *Syeds v. Hay*, *supra*. He said: "In the case of *Syeds v. Hay*, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action, but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Mor-

ally, there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarman*, 2 M. & W. 282, is plainly distinguishable. There, the agent was authorized to get the note discounted, which he did, and appropriated the avails. PARKE, B., said: "The defendant did nothing with the bill which he was not authorized to do." So in *Cairnes v. Bleecker*, 12 J. R. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris v. Simpson*, 21 Wend. 610, BRONSEN, J., lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own and may be treated as a *tort-feasor*." The result of the authorities is that if the agent parts with the property, in a way or for a purpose not authorized, he is liable for a conversion, but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it.

NOTE. — See, *accord*, *Boldenahn v. Schmidt*, 89 Wis. 444.

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### FITZGERALD v. BURRILL.

106 Mass. 446. 1871.

CONTRACT against Isaac S. Burrill and Robert A. Backup, for money had and received; with alternative counts in tort for the conversion of a letter and five pieces of gold coin therein contained. At the trial in the superior court, before REED, J., the following facts were proved or admitted:

"On March 5, 1869, the plaintiff, who was a stranger to the defendants, brought to the post-office, at the Roxbury station in the city

of Boston, a sealed letter, addressed to 'Edward Fitzgerald, Havre de Grace, Newfoundland,' containing gold to the value of \$32.25, and asked the defendant Backup, who was a clerk at the office, then on duty, and a part of whose business it was to register letters there to have it registered and sent as a registered letter to that place. The clerk thereupon undertook to register it, and signed and gave to the plaintiff a receipt for a registered letter, written upon a printed form, of which the following is a copy: 'Receipt for a Registered Letter. No. 95, March 5, 1869. Post-office, Roxbury, Mass. Received of John Fitzgerald a letter addressed to Edward Fitzgerald, Newfoundland. (Signed) W. L. Burt, per R. A. B., P. M.' The plaintiff paid Backup the postage and a registration fee required of him, and gave no other or further instruction to Backup than as aforesaid. On the same day Backup sent the letter to the main office, in Boston, and the day afterwards it came back to the Roxbury office, indorsed, 'Cannot be registered.' This was the first information which the defendant received that letters could no longer be registered for Newfoundland. The defendant Burrill, who was chief clerk in the Roxbury office, being made acquainted with these facts, advised Backup to keep the letter a few days; and it was kept at the Roxbury office accordingly from six to ten days, nothing being done to find the plaintiff except that some of the letter carriers were directed to make inquiries for him. At the end of the six to ten days, Burrill asked Backup if the person who mailed the letter had been there; and then told Backup to send the letter by the usual course of the mail. Backup thereupon put the letter in the ordinary, unregistered mail, and sent it away, and it was lost. It was in evidence that, at that time, the postal regulations did not permit letters to be registered for Newfoundland. The plaintiff, about a month after leaving the letter, hearing of its non-arrival at its destination, called at the Roxbury office, and, on learning the final disposition which was made of the letter, demanded its return of the defendants, which was refused."

On these facts, the judge ruled that the action could be maintained against Backup but not against Burrill, and by request of the parties reported the case before verdict; "if the above ruling was correct, judgment to be entered accordingly, and if not correct, such judgment to be entered as the supreme judicial court shall order."

CHAPMAN, C.J. The letter was delivered by the plaintiff, and received by Backup, with the agreement that it should be sent by mail as a registered letter. Both of them were mistaken in supposing that this could be done. When it came back from the Boston office to the possession of Backup, with the information that it could not be thus sent, he held it as bailee of the plaintiff without compensation, and owed the plaintiff merely the duties growing out of such

a relation. But he had no authority, express or implied, to send it by mail as an unregistered letter, and subject the plaintiff to the risk of losing it in that way. The plaintiff had not left it with him for such a purpose. Nor had Burrill any authority to direct him to send it in that way. It was unlike a letter left at the office without any instructions, for in such case there is an implied direction and authority to send a letter according to its superscription.

The report states that Burrill, after having advised Backup to keep the letter a few days, spoke to him again about it, at the end of from six to ten days, and, after inquiring about it, told Backup to send it by the usual course of mail. This expression would authorize the jury to find that Backup sent it by Burrill's direction. The ruling of the presiding judge, that the action could not be maintained against Burrill, was therefore erroneous; and, it not having been agreed that the court might pass upon this question of fact, and order judgment against Burrill, the proper order is, that judgment is to be entered upon the report against Backup, and a new trial is to be had as to Burrill.

*Ordered accordingly.*

*C. Delivery, by a Person having No Right in the Chattel  
to a Third Person.*

PEASE v. SMITH.

61 N.Y. 477. 1875.

THE action was brought for the alleged conversion by the defendants of a quantity of law blanks belonging to the plaintiffs.

Plaintiffs were book-sellers and stationers in the city of Albany. The defendants dealt largely in materials used in the manufacture of paper. Their course of business was to purchase from junk shops and small dealers rags, old paper, etc., in bales, and to sell to the manufacturers. They bought, among others, from Moses K. Perry, a junk dealer in Albany. The evidence upon the trial tended to show that among the materials purchased from Perry were law blanks belonging to the plaintiffs, which had been stolen from them by one Frank Mason, who was a porter in their employ. He lived in the building occupied by plaintiffs as a store, had the key to it, and it was his business to open it in the morning. He delivered packages and parcels of books, and went upon errands, etc., but was never authorized to sell their goods. Certain bales of paper materials containing these blanks were shipped after purchase by the defendants from Perry's store to Allen Brothers, paper manufacturers at Sandy Hill.

DWIGHT, C. It is claimed that the judge erred at the trial in refusing to grant a nonsuit, because the defendants bought the goods in controversy in the course of trade, and had sold them before any claim was made by the owners. It is insisted by the appellant that it is a prerequisite to a valid claim for conversion, in such a case, that a demand should have been made for the goods while they were in the defendants' possession, and before their sale, and that there can be no conversion, unless control over the property was exercised with knowledge of the plaintiffs' rights. This proposition is untenable. The assumed sale by the porter of the plaintiffs to Perry was wholly nugatory, and conveyed no title. *Saltus v. Everett*, 20 Wend. 267; *McGoldrick v. Willets*, 52 N.Y. 612. On like grounds, the sale by Perry to the defendants was without effect. They were constructively in possession of the plaintiffs' property without the consent of the latter. They even sent their own carts to transfer the goods when sold to Allen Brothers. This exercise of an act of ownership or dominion over the plaintiffs' property, assuming to sell and dispose of it as their own, was, within reason and the authorities, an act of conversion to their own use. The assumed act of ownership

was *inconsistent* with the dominion of the plaintiffs, and this is of the essence of a conversion. Knowledge, and intent on the part of the defendants, are not material. So long as the defendants had exercised no act of ownership over the property, and had acted in good faith, a demand and refusal would be necessary to put them in the wrong and to constitute conversion. Until such demand, there is no apparent inconsistency between their possession and the plaintiffs' ownership. After a sale has been made by the defendants, they have assumed to be the owners, and will be estopped to deny, in an action by the lawful owner, the natural consequences of their act, and to resist an action for the value of the goods. The principle is well stated by ALDERSON, B., in *Fouldes v. Willoughby*, 8 M. & W. 540: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places." In the same spirit, "conversion" is defined, in a very recent case, to be an unauthorized act which deprives another of his property permanently or for an indefinite time. *Hiort v. Bott*, L. R. [9 Ex.] 86 [A.D. 1874]. So, it is said in *Boyce v. Brockway*, 31 N.Y. 490, that a wrongful intent is not an essential element in a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it. No manual taking, on the defendants' part, is necessary. *Bristol v. Burt*, 7 J. R. 254; *Connah v. Hall*, 23 Wend. 462. The case of *Harris v. Saunders*, 2 Strobb. Eq. 370, resembles closely the case at bar. The defendant having the property of the plaintiff in his own hands by purchase from one who had no title, sold it to another who carried it beyond the plaintiff's reach and received the purchase-money. These acts were held to amount to a conversion, though the defendant was not aware of the plaintiff's title. As, according to these views, the conversion took place at the moment of the unauthorized sale by the present defendants, no demand was necessary, the sole object of a demand being to turn an otherwise lawful possession into an unlawful one, by reason of a refusal to comply with it, and thus to supply evidence of a conversion. *Esmay v. Fanning*, 9 Barb. 1786; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Glassner v. Wheaton*, 2 *id.* 352; *Munger v. Hess*, 28 Barb. 75. After a wrongful taking and carrying away of the property, the cause of action has become complete without further act on the plaintiff's part. *Brewster v. Silliman*, 38 N.Y. 423; *Hanmer v. Wilsey*, 17 Wend. 91; *Otis v. Jones*, 21 *id.* 394.

NOTE. — See, *accord*, *Robinson v. Hartridge*, 13 Fla. 501, 513; *Morrill v. Moulton*, 40 Vt. 242.

*Newsum v. Newsum*, 1 Leigh (Va.) 86. An administrator sold by

mistake property not belonging to his intestate, and applied the proceeds to payment of his intestate's debts. He was held to have converted the property.

*Kenney v. Ranney*, 96 Mich. 617. A receiver sold by mistake property to which he had no right, as receiver, and turned over the money derived from the sale as directed by the court. He was held to have converted the property.

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### TRAYLOR v. HORRALL.

4 Blackf. (Ind.) 317. 1837.

ERROR to the Daviess Circuit Court.

BLACKFORD, J. Trover by Horrall against Traylor, Capehart, and Cain. Plea, not guilty. The only evidence respecting the conversion was as follows: The plaintiff had put his corn into a crib, which he had hired for the purpose, of Kinman, and which stood on Kinman's land. The defendants and some other persons being present where the crib of corn was, Capehart offered the corn at public sale, and Traylor bid it off at the price of thirty-one dollars. Cain said that he had the officers bound for his money. The plaintiff was also present, and forbid any person from selling or removing the corn, claiming it to be his. Cain afterwards said that he had got his money from Capehart. The defendants demurred to the evidence, and agreed that if judgment were rendered for the plaintiff, the court might assess the damages. The demurrer was sustained as to Cain, but there was a judgment against the other defendants, for seventy-four dollars in damages, together with costs.

We are satisfied that the record shows no evidence conducing to prove a conversion in this cause, and that the judgment for the plaintiff is consequently erroneous.

To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant. Buller's N. P., page 33. The gist of the action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he cannot be charged with a conversion of them to his own use.

In the present cause, it does not appear why the form of a public sale of the corn in question took place. It is not shown that Capehart, the alleged seller, had seized the property under any process of law, or that at the time of the sale, or at any other time, he had or pretended to have any possession of it whatever. Neither was there any attempt to prove, that Traylor, the purchaser, ever took possession of the property, or exercised any act of ownership over it.

The case of *Bristol v. Burt*, 7 Johns. Rep. 254, is referred to by the

plaintiff. But the court there expressly say, that the defendant had exercised the highest and most unequivocal acts of dominion and control over the goods, not only by claiming jurisdiction over them, but by placing armed men near them to prevent their removal. They say further, that the defendant thus detained the goods for several months, and that a charge was therefore brought upon the plaintiff. The court, in that case, do not appear to have had any idea, that the suit could be maintained without showing that the defendant had intermeddled with the goods, and had for a time excluded the plaintiff from their possession. They rely on *Baldwin v. Cole*, 6 Mod. Rep. 212. The plaintiff had there sent his servant with some tools to work in the queen's yard for hire. The plaintiff, some time afterwards having taken away his servant, sent for the tools, but the defendant refused to deliver them up. Trover was then brought for the tools, and the action was sustained on the ground, that, as the defendant had wrongfully undertaken to detain them, he took upon himself the right to dispose of them, which was a conversion. The case in 6 Mod. Rep. is settled law, and being relied on in *Bristol v. Burt*, it shows the ground upon which the latter case was intended to be placed by the court.

In *M'Combie v. Davies*, 6 East, 538, the plaintiff, by his agent, bought some tobacco which was in the King's warehouse; but the agent took the transfer of the tobacco on the warehouse books in his own name. The agent afterwards pledged the tobacco in his own name with the defendant, and transferred it into the defendant's name on the books in the warehouse. The plaintiff demanded the tobacco of the defendant, who refused to deliver it up until the debt for which it was pledged should be paid. The plaintiff then sued the defendant in trover for the tobacco. It was strongly contended at the trial that there had been no conversion; and the plaintiff was nonsuited. The nonsuit, however, was subsequently set aside and the plaintiff recovered. In that case the defendant, by the transfer to him on the dock books, had the virtual possession and exclusive control of the property, and he wrongfully refused to deliver it to the rightful owner.

In a subsequent case, Chief Justice BEST took occasion to say, that Lord ELLENBOROUGH, in *M'Combie v. Davies*, had gone to the extreme verge of the law; that as far as that he should go himself; but that in the case before Lord ELLENBOROUGH, the state of the property was changed, because there had been a transfer in the dock books, which, it was well known, is as much a transfer for the purposes of trade, as an actual removal from one warehouse to another; and that there was, in that case, the exercise of dominion over the goods. *Mallalieu v. Laugher*, 3 Carr. & Payne, 551.

The cause which we are now to decide is very different from any of those to which we have referred. For anything that the record



before us presents, the plaintiff may have always continued in the undisturbed possession of the corn in the place where he originally deposited it, or he may have sold it, or have otherwise converted it to his own use.

PER CURIAM. The judgment, etc., against the plaintiffs in error is reversed with costs.

*Cause remanded, etc.*

NOTE. — See, *accord*, *Lancashire Waggon Co. v. Fitzhugh*, 6 H. & N. 502.

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RAMSBY v. BEEZLEY.

11 Or. 49. 1883.

By the Court, LORD, J.:

This was an action of trover, and the only question involved in the case is, what will constitute a conversion? It originated in the refusal of the court to give certain instructions asked by the defendant, and an exception to an instruction given, based upon evidence tending to show about this state of facts: That the plaintiff was the owner of the cattle in controversy by purchase from one Smith, which were running at large on the range; that the defendant sold them to Strickland, and received therefor the sum of \$500, and that the plaintiff has never seen, nor had possession of the cattle since. The defendant admitted that he sold the cattle to Strickland, received the money for them, and "believed and supposed that Strickland had took them," but there was no evidence that the defendant ever exercised any other actual control, or dominion over the cattle than such sale to Strickland, or that he actually delivered them to him, or that Strickland ever gathered the cattle in pursuance of such sale, except what may be inferred from the fact that the plaintiff has never seen, nor had possession of his cattle since the sale, and the payment for the cattle, and the admission of the defendant that he believed and supposed that Strickland had taken the cattle. Upon this state of facts, the court gave the following instruction to the jury, to which the defendant excepted: "Any assertion of title to, or any act of dominion over personal property inconsistent with the rights of the owner, is a conversion. A sale of the property of one person by another, is a conversion. Therefore, if you find the plaintiff was the owner of the cattle at the time of the alleged taking, and that the defendant sold them without the plaintiff's consent, or in any way appropriated them to his own use without plaintiff's consent, you should find for the plaintiff in such sum as he was damaged thereby. But if you find that the plaintiff was not the owner of the cattle, or that the defend-

ant did not so convert them, you should find for the defendant." The effect of the instruction asked, and the point raised is, that to maintain an action of trover, the defendant must have actual or virtual possession of the property. A conversion is defined to be, "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." Cooley on Torts, 448. "It may be laid down as a general principle," says Mr. Bigelow, "that the assertion of a title to, or an act of dominion over personal property, inconsistent with the right of the owner, is a conversion." Bigelow's Lead. Cases on the Law of Torts, 428; 2 Hill on Torts, sec. 3, p. 97. Of the different ways by which a conversion of personal property may be effected, one is, where a party sells the property of another without his authority or consent. Such sale is the assumption of ownership, of dominion over, or right to control the property, inconsistent with, and in denial of the rights of the true owner. Hence it is said, "Every assuming by one to dispose of the goods of another is a conversion." Trover, Bacon's Abridg. 631. Or "the assumption of authority over property, and actual sale, constitutes a conversion." *Gillman v. Hill*, 36 N.H. 324. No actual force need be used (*Gibbs v. Chase*, 10 Mass. 128); nor any manual taking or removal of the property (*Reynolds v. Shuler*, 5 Cow. 326; *Connah v. Hale*, 25 Wend. 465); nor proof that the defendant had actual possession of the property (*Farnell v. Chase*, 37 Maine, 290); for, in the language of SHEPLEY, C.J.: "The exercise of such a claim of right, or dominion over the property as assumes that he is entitled to the possession, or to deprive the other party of it, is a conversion." See also, 6 Mod. 212; *McCombie v. Davis*, 6 East, 540; *Reid v. Colcock*, 1 Nott. & McC. 601; *Dickey v. Franklin*, 32 Maine, 572.

As applied to the facts, the instruction was not objectionable. The defendant had assumed to himself the property and the right of disposing of the plaintiff's cattle. He sold them, received the money for them, authorized the purchaser to take them, and swears he believed and supposed the cattle were taken. The gist of conversion is the owner's deprivation of his rightful dominion and control over his property. Under this state of facts, the sale of the defendant was a wrongful assumption of authority and dominion, subversive of the rightful dominion and control of the plaintiff over his property. The judgment must be affirmed.

*Judgment affirmed.*

NOTE. — See, accord, *Mead v. Thompson*, 78 Ill. 62.

## VARNEY v. CURTIS.

213 Mass. 309. 1913.

LORING, J. This is an action for the conversion of six Northern Pacific Great Northern joint bonds (registered and non-negotiable), one Union Pacific bond (registered and non-negotiable), two Wolfeborough water bonds (negotiable coupon bonds) and one bond of the town of Wolfeborough (negotiable coupon bond), all, with the exception of the last (which was for \$200), being bonds for \$1,000. The case was tried before Justice SCHOFIELD without a jury. He found for the plaintiff, and the case is here on exceptions to his refusal to give seven rulings asked for by the defendant.

So far as now material the facts found by the judge were as follows: The plaintiff's husband died in February, 1902. Some of the securities here in question came to her under her husband's will and some of them had been owned by her before his death. Soon after her husband's death these bonds were delivered by the plaintiff to her son-in-law, Symonds by name, a stock broker, to be kept by him for her in his safe deposit box. In April, 1902, the son-in-law opened an account with the defendants for the purchase and sale of stocks and bonds on margin and delivered to them as security for that account *inter alia* four of the plaintiff's Northern Pacific Great Northern joint bonds with forged indorsements. In the last part of January, 1904, Symonds directed the defendants to transfer this account to Colton and Company. Pursuant to that direction the defendants, on February 1, 1904, delivered to Colton and Company all the stocks and bonds which they were then carrying on margin for Symonds, and the bonds held by them as security for that margin account (including these four bonds), on receiving from Colton and Company \$10,515.54, the amount due to them from Symonds. In this connection the judge made the following finding and ruling: "The defendants in making delivery to E. S. Colton and Company knew that the bonds previously held by them as collateral would be held by Colton and Company as collateral, and intended that result. The court, in so far as it is a question of fact, finds as a fact, and in so far as it is a question of law, rules as matter of law, that such a delivery by the defendants was more than a mere transfer of physical possession of the bonds to Colton and Company, by order of Symonds. It was a transfer of possession of bonds which they held as collateral with the intention that the transferees should also hold them as collateral. The court also finds as a fact that the defendants were not obliged to make such a delivery in the performance of any duty which they owed to Symonds by contract as bailees or pledgees under him. They did it voluntarily in pursuance of his instructions and as the means of obtaining payment of the debt he owed to them. They had no

knowledge or notice that the plaintiff was the true owner of the bonds, but the court rules that the act of delivery to Colton and Company with the intention above stated was an exercise of ownership, in exclusion of the rights of the true owner, an act of dominion, and a conversion."

On March 14, 1904, Symonds opened another margin account with the defendants and deposited as security for that account another Union Pacific Great Northern joint registered bond belonging to the plaintiff, with a forged indorsement. A month and one half later, to wit, on April 30, he deposited two registered bonds with forged indorsements (the Union Pacific bond and a Northern Pacific Great Northern) and two coupon bonds (one Wolfeborough water bond, and one Wolfeborough town bond for \$200), and on May 2 he deposited with the defendants another Wolfeborough water bond (a coupon bond), all the property of the plaintiff. The judge found that by reason of what happened between March 14, when this account was opened, and April 30, on or after which day the securities last mentioned were deposited, the defendants took with notice all the bonds deposited as security for the second account except the non-negotiable Northern Pacific Great Northern bond deposited on March 14, and were not purchasers of those bonds in good faith.

On May 7 or 9, at Symonds's request, the defendants delivered to Berry and Company the securities then being carried by them in the second margin account and the bonds held as security for that account, and received from Berry and Company a check for \$11,237.13, the balance due from Symonds on that account. The judge ruled "that the act of the defendants in taking the bonds into their possession from Symonds with notice, intending to hold them as pledgees, was in itself an exercise of dominion over them in denial of the rights of the true owner, and a conversion," and made "the same findings of fact and rulings of law in regard to the two transfers of account." The judge found that Berry and Company became bankrupt and that the bonds received by Colton and Company were sold by them and no part of the proceeds came to the plaintiff. He found for the plaintiff for the sum of \$7,022.94, the value of the ten bonds after deducting the value of four bonds recovered from the assignees of Berry and Company. The only exceptions taken by the defendants were to the refusal of the judge to give the seven rulings asked for by them.

1. The first ruling asked for <sup>1</sup> could not have been given, because the judge found as a fact that all the bonds (except one) deposited with the defendants as security for the second account were taken by them with notice. There can be no question but that the judge was right in ruling "that the act of the defendants in taking the

<sup>1</sup> The first ruling asked for was in these words: "Upon all the evidence the plaintiff Emma J. Varney is not entitled to recover, and the verdict is to be for the defendants."

bonds into their possession from Symonds with notice, intending to hold them as pledgees, was in itself an exercise of dominion over them in denial of the rights of the true owner, and a conversion." There was evidence which amply warranted the judge in making the finding of fact that the defendants took these bonds with notice. Indeed the defendants have not argued that there was not. The exception to the refusal to give this ruling must be overruled.

2. The sixteenth ruling asked for <sup>1</sup> was rightly refused because: (first) as matter of law the judge was not bound to find (if indeed he could have found) that the plaintiff was careless in entrusting her bonds to Symonds for safe keeping; and (secondly) even if she was careless in so doing she would not have been negligent. She owed no duty to the defendants to keep her securities carefully, and so as against them she was not negligent if she kept them carelessly. An owner who keeps his securities in a careless manner does not lose his property in them nor his rights of action founded thereon. That was decided in *Shepard & Morse Lumber Co. v. Eldridge*, 171 Mass. 516. It is to be borne in mind that these bonds were not indorsed by the plaintiff, as was the case in *Scollans v. Rollins*, 173 Mass. 275; s. c. 179 Mass. 346. Had the plaintiff entrusted these bonds to Symonds indorsed by her a different question would have been presented.

3. The twenty-first and twenty-second rulings asked for <sup>2</sup> are based on *Loring v. Mulcahy*, 3 Allen, 575, and *Leonard v. Tidd*, 3 Met. 6, and the contention is that this case comes within those decisions.

It is settled that where a bailee receives on deposit goods from one in possession but without title to them, and afterwards restores them to the possession of the bailor in ignorance of the rights of the true owner, he is not guilty of a conversion. *Loring v. Mulcahy*, 3 Allen, 575; *Hill v. Hayes*, 38 Conn. 532; *Steele v. Marsicano*, 102 Cal. 666; *Nelson v. Iverson*, 17 Ala. 216; *Frome v. Dennis*, 16 Vroom, 515. For

<sup>1</sup> The sixteenth ruling asked for was in these words: "16. If the court finds upon all the evidence that the plaintiff entrusted the bonds in question or any of them to George E. Symonds and gave him full possession and control of the same, and the said George E. Symonds misappropriated the said bonds and gave them to the defendants as collateral security for certain purchases of stock, then the plaintiffs were negligent in their care of the said bonds and are estopped from claiming same or the value of the same from the defendants."

<sup>2</sup> The twenty-first and twenty-second rulings asked for were in these words: "21. The delivery of the bonds to Colton & Company by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff and for such bonds the plaintiff is not entitled to recover, it being agreed that the bonds had not depreciated during the period that the defendants held the same.

"22. The delivery of the bonds to Berry and Company by the defendants in accordance with the directions of the plaintiff's agent, George E. Symonds, was equivalent to a return of the said bonds to George E. Symonds and therefore constructively a return to the plaintiff, and for such bonds the plaintiff is not entitled to recover, it being agreed that the bonds had not depreciated during the period that the defendants held the same."

other cases where the temporary use of the property of another made by a defendant acting in good faith under a mistake of fact has been held or said not to be a conversion, see *Strickland v. Barrett*, 20 Pick. 415; *Wellington v. Wentworth*, 8 Met. 548; *Spooner v. Manchester*, 133 Mass. 270; *Shea v. Milford*, 145 Mass. 525; *Gurley v. Armstead*, 148 Mass. 267.

It is pointed out in Pollock on Torts, 374, in connection with this rule, that a bailee under those circumstances is estopped to deny the title of the bailor. That means that in returning the goods to the bailor the bailee does no more than perform the duty he owes to the bailor. He cannot be guilty of a conversion for doing that.

In *Leonard v. Tidd*, 3 Met. 6, this principle was applied in a case where the defendants acting in good faith received as security for a debt due to them from the pledgor a gun, the property of the plaintiff, which was in the possession of the pledgor, and returned the property pledged to the wrongful pledgor upon payment of the debt due them from him. For a similar decision see *Spackman v. Foster*, 11 Q. B. D. 99. The reasoning on which the decision in *Spackman v. Foster* went was that although the pledgee in such a case claims to hold the property as against the wrongful pledgor until the debt due him from the wrongful pledgor is paid, so far as appears he does not claim to hold the property pledged as against the true owner. The same reasoning was adopted in *Loring v. Mulcahy*, *ubi supra*. That is to say, in such a case, so far as the true owner is concerned the pledgee is in possession under one to whom the true owner had given possession, and by returning the pledged property to the wrongful pledgor the pledgee does nothing more than perform the duty he owes the wrongful pledgor under the circumstances in effecting a restoration of the original status in quo, to wit, in putting back the property into the possession of the wrongful pledgor where originally it had been put by the true owner.

But in the case at bar the plaintiff's bonds, which the defendants received in good faith from Symonds in whose possession the plaintiff had put them, were not returned to Symonds. On the contrary they were delivered by Symonds's direction to persons who to the defendants' knowledge were lending money to Symonds on the security of the bonds. That is to say, the defendants in place of restoring the bonds to Symonds delivered them to a third person in obedience to a subsequent act on the part of Symonds which was an act of ownership and not of mere possession.

The question whether under those circumstances the pledgor is guilty of a conversion has not arisen in this Commonwealth. In *Leonard v. Tidd*, 3 Met. 6, the gun was not delivered by the pledgee to the purchaser from the wrongful pledgor. In that case the wrongful pledgor "took the gun from a room in the defendant's house, and delivered it to Pratt," the purchaser from the wrongful pledgor. See

where a bailee returning the goods to the bailor cannot be guilty of conversion for doing that.

The subsequent act of dominion was a conversion, and in that conversion the defendants participated for the purpose of forwarding their own interests. The case therefore is not only a stronger case than *Hudmon Brothers v. DuBose*, 85 Ala. 446, where the defendant had no knowledge and no interest, but it is a stronger case than the case put by BLACKBURN, J., in *Hollins v. Fowler*, L. R. 7 H. L. 757, where the defendants had knowledge but no interest. It is also a stronger case than the case of *Hiort v. Bott*, L. R. 9 Ex. 86. In that case one Grimmett, to defraud the plaintiff of certain barley, professed to buy it on behalf of the defendant, to whom by Grimmett's direction it was shipped, deliverable to consignor or consignee. After the barley had arrived at its destination, Grimmett procured an order for its delivery from the defendant on the plea that it was sent to him by mistake and that such an order would cure the mistake. This was held to be a conversion on the ground that it was an unauthorized act by which the plaintiff lost the barley. In the words of BRAMWELL, B., "This was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiff of them." For a similar decision see *Knapp v. Guyer*, 75 N.H. 397. In the case at bar the defendants, by an unauthorized act, undertook to control the disposition of the plaintiff's bonds and delivered them to persons who deprived the plaintiff of her property. That makes them guilty of a conversion of them.

It is not out of place to point out again what before now has been said several times (see for example MARTIN, B., in *Burroughes v. Bayne*, 5 H. & N. 296; BRAMWELL, B., in *Hiort v. Bott*, L. R. 9 Ex. 86, 90), namely, that the terms "conversion" and "converting to his own use" are misleading and unfortunate terms. As was said by COLLINS, J., in *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495, 498, "The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (per MARTIN, B., in *Burroughes v. Bayne*, 5 H. & N. at p. 301, and per Lord MANSFIELD, C.J., in *Cooper v. Chitty*, 1 Burr. at p. 31), and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it." It was from this allegation of a fictitious finding by the defendant that the action got its name of trover. 3 Bl. Com. 152, 153. The declaration in trover and conversion alleged the ownership of the plaintiff, a "casual" loss by him and a finding by the defendant. It then alleged that after thus coming lawfully into possession of the goods the defendant "converted and disposed of the said chattels to his own use." See for example 2 Chitty, Pl. (2d London ed.) 371, 372. It might perhaps have been better if the terms "conversion" and "converted to his own use," which were brought in by the allegation of a fictitious loss and finding, had been given up when that

allegation was given up, and a plainer statement of a tortious act on the part of the defendant by which the plaintiff lost his goods had been substituted.

We are of opinion that the delivery of the bonds to Colton and Company and to Berry and Company were not "equivalent to a return of the said bonds to George E. Symonds," and the twenty-first and twenty-second rulings asked for were properly refused.

4. No argument either at the bar or on the brief has been made in support of the three other rulings asked for. The defendants however have contended that they should have been given. Under these circumstances it is enough to say that we find that no error was committed by the judge in refusing to adopt them.

5. The defendants have argued some points of law not raised by the rulings asked for. For that reason we have not discussed them. It is not improper to add that we should have found that no error had been committed by the judge had the questions argued been raised.

*Exceptions overruled.*

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ROGERS v. HUIE.

1 Cal. 429. 1851.

ACTION of trover. The plaintiff alleges in his complaint that, on the 12th day of December, A. D. 1850, he was the owner of twenty-nine kegs of butter, of the average weight of twenty-five pounds each, and of the value of thirty cents per pound; and also of one hundred cheeses, weighing fifteen hundred pounds, and worth twenty cents per pound; and that the value of the butter and cheese together was five hundred and seventeen dollars. The complaint further alleged that the butter and cheese were taken away from the plaintiff without his knowledge and consent by some person or persons to him unknown, and passed into the hands of the defendant, an auctioneer in San Francisco, who converted them to his own use without the knowledge or consent of the plaintiff.

A general answer was put in by the defendant denying the allegations of the complaint.

The cause was tried before a jury, who rendered a verdict in favor of the plaintiff for \$437.50.

It was established, on the trial of the cause, that the plaintiff, who was a merchant in Boston, shipped the butter and cheese in question to his agent at San Francisco, and that, on their arrival at that place, the agent had them lightered from the ship, and deposited on shore, on the 9th day of December, where they were left. On the 14th day of December, the agent went to show them to a customer, and found



that they had been carried away. They had, in fact, been stolen, and taken by the thief to the defendant, who was an auctioneer, and by him sold in the usual course of his business. The proceeds of the sale, after deducting the commissions of the defendant, had been paid over to the thief. There is no suspicion that the defendant supposed that the property had been stolen, or that he acted otherwise than in perfect good faith.

BENNETT, J. An auctioneer who receives and sells stolen property, is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods, than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them. As a general rule any person who assumes and exercises a control over the property of another, without right or authority, must respond in damages to the value of the property; and I see no principle of policy for the encouragement of trade, or for convenience in the transaction of commercial business, under which an auctioneer should be permitted to claim an exemption from the general rule.

Upon authority the case is clear. The very point was decided in *Hoffman v. Carew* (20 Wend. 21; and 22 Wend. 285, s. c.). That case is in all respects analogous to the case at bar, and both the supreme court and the court of errors held the auctioneer liable. Senator Verplanck, in the court of errors (22 Wend. 319), speaking of the policy of the rule, uses the following language: "In this instance, the ruin falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and, in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it."

NOTE. — See, *accord*, *Coles v. Clark*, 3 Cush. (Mass.) 399; *Kearney v. Clutton*, 101 Mich. 106; *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495. See, *contra*, *Frizzell v. Rundle*, 88 Tenn. 396.

Similarly as to a stock-broker. *Swim v. Wilson*, 90 Cal. 126. And the agent of a tenant in common who sells the whole chattel. *Permynter v. Kelly*, 18 Ala. 716. And the agent of a person having no

right in the chattel. *Pool v. Adkisson*, 1 Dana (Ky.) 110; *Kimball v. Billings*, 55 Me. 147.

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PARKER v. GODIN.

2 Strange, 813. 1728.

SATUR, a bankrupt at the time of his going off, left some plate with his wife, who in order to raise money upon it delivered it to her servant, who went along with the defendant to the door of Mr. Woodward the banker, and there the defendant took the plate into his hands and went into the shop *and pawned it in his own name, gave his own note to repay the money*, and immediately upon receipt of it went back to the bankrupt's wife, and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

NOTE. — *Perkins v. Ladd*, 114 Mass. 420. The defendant sold perishable property which had belonged to a deceased soldier, at the direction of his widow, and remitted the proceeds of the sale to her, without charge for his services. The administrator of the estate of the deceased soldier complained of this act, as a conversion of the property, but the court held that the defendant had done no wrong.

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SPOONER v. HOLMES.

102 Mass. 503. 1869.

TORT to recover the value of certain interest coupons of United States bonds, payable to bearer in gold, and alleged to have been converted by the defendant to his own use. Trial in the superior court before REED, J., who allowed a bill of exceptions which stated the case as follows: —

“The plaintiff's evidence tended to show that the coupons in question were stolen from the plaintiff by a servant in his employ, and by that servant given to her sister, who was a servant in the family of the cashier of one of the national banks in Plymouth; and that the defendant purchased the coupons of the servant in the cashier's family, and under circumstances which would naturally excite sus-

picion that they were stolen. The defendant's evidence tended to show that they were handed to him merely to get them changed, that there were no suspicious or unusual circumstances attending the transaction, and that he was simply the agent of the servant.

"Among the evidence introduced by the defendant was a letter received by him from Nova Scotia, purporting to be from the said servant of the cashier, she having, before that time, gone thither. In said letter were inclosed two of the coupons in question, which were sold by the defendant. The plaintiff objected to the introduction of this letter in evidence without proof of the handwriting; but the judge ruled it to be admissible without such proof, for the purpose of showing the manner and circumstances of the defendant's receiving the two coupons which it contained.

"Some of the coupons were sold by the defendant to the Plymouth National Bank, some were sold to brokers in Boston, and one was sold to a person from Lynn, with whom the defendant traded, and who happened to be at his shop in Plymouth, at the same price which he had received for others from the bank. The evidence tended to show that the defendant received pay for this coupon in goods from the Lynn man, and paid the servant the price thereof in money.

"The judge instructed the jury, among other things, as to the rules of law applicable in cases of goods and merchandise stolen or otherwise lost, and coming into the possession of persons other than the true owners, in terms not objected to; but then ruled and instructed the jury that the same rules did not apply to money or the currency of the country, and did not apply to such coupons as those in question, which to some extent formed a part of the currency; that the jury were to consider whether the defendant purchased the coupons in question or whether he merely received them to sell for the servant, and acted in regard to them as her agent; that, if they found the former to be true, and that the defendant purchased them under such circumstances as would have put a person of ordinary prudence on his guard, and would have led such a person to refuse them, they should find for the plaintiff; that, if they found that the defendant was acting as agent merely, to get the coupons turned into money for the servant, then the plaintiff could not recover, unless he satisfied the jury that the defendant either knew that the servant had come dishonestly by them, or might so have known except for his gross negligence; and that gross negligence was the carelessness of a very careless person.

"The plaintiff requested the judge to instruct the jury that paying out the coupons in his business, or exchanging them for goods, was inconsistent with agency, unless the articles received in exchange were delivered to the principal; and that, to entitle the defendant to the benefit of the defence of agency, if there were any suspicious facts or circumstances which came to his knowledge, he must have

disclosed them or disclosed his agency. The judge declined to give either of these instructions.

"The verdict was for the defendant, and the jury, in reply to a question of the judge, said they found the defendant to have been acting as agent."

GRAY, J. This is an action of tort, in the nature of trover, for certain coupons of United States bonds, alleged in the declaration to be the property of the plaintiff and to have been converted by the defendant to his own use. The undisputed evidence at the trial showed that the bonds had belonged to the plaintiff, and had been stolen from him, and delivered by one who received them from the thief to the defendant, and by him sold and turned into money, which he is admitted to have paid over to his principal. But the jury have found that in so doing the defendant acted only as agent of the person from whom he received them, and did not know, and was not guilty of gross negligence in not knowing, that that person had come dishonestly by them. It does not appear that the plaintiff ever demanded of the defendant either the coupons or their proceeds, or that the defendant personally derived any benefit from his acts. The principal question in the case is, whether, under these circumstances, he is liable in this action. This is an important question, and has received great consideration from the court.

An action of tort for the conversion of personal property, under our present system of pleading, requires such evidence to support it as would have proved a conversion in an action of trover at common law; and cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property. *Fouldes v. Willoughby*, 8 M. & W. 540; *Heald v. Carey*, 11 C. B. 977; Gen. Sts. c. 129, § 81; *Robinson v. Austin*, 2 Gray, 564; *Loring v. Mulcahy*, 3 Allen, 575; *Parker v. Lombard*, 100 Mass. 405. In the last case, Mr. Justice HOAR says that if a bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion; and cites *Strickland v. Barrett*, 20 Pick. 415, and *Leonard v. Tidd*, 3 Met. 6. So where chattels were delivered by the owner to a bailee, with the right to purchase them by paying a certain price, so that he had the actual legal and rightful possession, although he had not performed the condition on which he was to have the absolute title, and he sold them to a third person, who resold them before any demand made upon him and without notice of the agreement between his vendor and the original owner, he was held not to be liable to the latter in trover. *Vincent v. Cornell*, 13 Pick. 294. See also *Day v. Bassett*, ante, 445. And trover will

not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful. Bul. N. P. 47. *Powell v. Hoyland*, 6 Exch. 67.

In the case of a sale of goods, indeed, the purchaser is bound to look to his title, and, if he obtains them from one who is not the lawful owner or his authorized agent, cannot hold them against him. 2 Kent Com. (6th ed.) 324. If the goods have been stolen, the property does not pass by delivery, and a person who derives his title from the thief gains no rights as against the lawful owner, and if he either refuses upon demand to deliver them up, or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover. *Dame v. Baldwin*, 8 Mass. 518; *Heckle v. Lurvey*, 101 Mass. 344. Upon this principle, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen; or a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person; is liable to the rightful owner in trover, without a previous demand. *Hoffman v. Carow*, 22 Wend. 285; *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171. Yet even in the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and, before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. *Loring v. Mulcahy*, 3 Allen, 575.

But, in the opinion of a majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the government, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are therefore not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. *Wookey v. Pole*, 4 B. & Ald. 1; *Gorgier v. Mievill*, 4 D. & R. 641; s. c. 3 B. & C. 45. *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12. The rule of *caveat emptor* does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank, unless it is proved that he did not take it in good faith and for valuable consideration; and that his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488; *Wyer v. Dorchester & Milton Bank*, 11 Cush. 51; *Raphael v. Bank of England*, 17 C. B. 161. And, according to the great weight of authority, the same rule applies to bills of exchange or promissory notes payable to bearer. *Goodman v. Simonds*, 20 How. 343.

The jury have found that the defendant took these coupons in good faith, without gross negligence, and as agent of his employer. He thus acquired a lawful possession of them, which was no evidence of a conversion. He then, before any demand or notice from the rightful owner, transferred them by delivery, and exchanged them for money, the amount of which he paid over to his employer. This case does not present the question whether the defendant could have been held liable to the rightful owner for the coupons or the proceeds while in his own hands, nor whether he could be held to have paid value for them. The single question is, whether he has been guilty of a wrongful conversion; and, considering the nature of the instruments, and the fact that the defendant was acting in good faith, without gross negligence, as agent only, without himself receiving any benefit from the transaction, a majority of the court is of opinion that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to his employer, constituted a conversion for which he can be held liable in an action of tort in the nature of trover. Addison on Torts (3d ed.) 317. The instructions to the jury were therefore quite favorable enough to the plaintiff.

The letter admitted against the objection of the plaintiff was competent evidence of the manner in which and the circumstances under which the defendant received the coupons, although it did not of itself prove that it was written by his employer.

*Exceptions overruled.*

**NOTE.** — In *Kimball v. Billings*, 55 Me. 147, the court said (p. 151): "It is no defence to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another, without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title. Story on Agency, §§ 311 and 312, and authorities there cited; *Coles v. Clark*, 3 Cush. 399. If, therefore, it be true, as the defendant says, that, in selling the bonds sued for in this case, he acted as the agent or servant of Mrs. Witham, and had no knowledge or suspicion that she was not the true owner of them, these facts constitute no defence to the suit. Mrs. Witham could not secure to him immunity for an act which she could not lawfully do herself. Nor is it any defence that the property sold was government bonds payable to bearer. The bona fide purchaser of a stolen bond payable to bearer, might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases; nor to the agent of one not a bona fide holder. The evidence in this case satisfies us that Mrs. Witham was not a bona fide holder; that

she received the bonds well knowing that they had been stolen, if she did not in fact procure the theft to be committed. The defendant took the bonds into his possession, and, as her agent or servant, sold them."

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### HOLLINS v. FOWLER.

L. R. 7 H. L. 757. 1875.

THIS was an appeal on a case stated, on which the Court of Queen's Bench had given judgment for Fowlers, the plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber, Law Rep. 7 Q. B. 616.

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs. Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed a purchase on his master's account. Messrs. Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as broker for Thomas Seddon, of Bolton. The inquiries as to Mr. Seddon being quite satisfactory, Messrs. Rew forwarded to Fowlers, their principals, a sold note, in these terms:—"Liverpool, Dec. 18, 1869. Messrs. Fowler Brothers. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales — American — at 12d., per Minnesota," and the buyer's name was given thus: "Thomas Seddon, per H. K. Bayley." The payment was to be "cash within ten days, less 1½ per cent discount." A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs. Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. Rew sent to Bayley the following note: "Mr. Thomas Seddon, per Messrs. H. K. Bayley & Co. Bought from Fowler Brothers, per Rew & Freeman, brokers, 13 bales American cotton, ex Minnesota, 12d. per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent discount."

On the 23rd of December, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants), who consented to purchase the thirteen bales at 11½d. per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs. Hollins, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. Micholls,

cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr. Micholls would be in Liverpool to purchase cotton through the Messrs. Hollins, and those gentlemen had bought the cotton from H. K. Bayley believing it to be of the sort which Messrs. Micholls would require. On examining the cotton, Mr. Micholls agreed to take it. Messrs. Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, Messrs. Hollins disposed of it to some other customer. In the latter part of the 23rd of December, Bayley received a delivery order in these terms: "Please deliver the bearer . . . cotton, ex Minnesota, at 11<sup>3</sup>/<sub>4</sub>d. per lb., bought this day for Micholls & Co. Francis Hollins & Co." The thirteen bales were delivered on the following morning to Messrs. Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and portorage, the defendants, Messrs. Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

*Bayley  
received  
the price  
from  
Hollins &  
Co.*

Messrs. Fowler not having received payment for the cotton at the stipulated time (ten days), applied to Mr. Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs. Hollins for the bales of cotton, when the answer given was, "the cotton was bought by one of our spinners, Messrs. Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance." The action for trover was afterwards brought.

The cause was heard before Mr. Justice WILLES, at the Liverpool Spring Assizes, 1870, when the facts above stated having been proved, the learned judge left two questions to the jury: first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice WILLES then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion, and so the judgment of the court below stood affirmed.

This appeal was then brought.

MR. JUSTICE BLACKBURN: My Lords, it appears from the statement in the case that Fowlers, the plaintiffs, had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, their



property, they believing that they had sold these bales to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that Fowlers thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery.

*Remained in Fowlers.*  
Under such circumstances the property and legal right to the possession remained in Fowlers, and Bayley could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not intrusted by the plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon.

These points were decided, as I think rightly, in the case of *Hardman v. Booth*, 1 H. & C. 803.

From the terms of reservation (set out in the note to the report of the present case), it appears that the defendant had an opportunity to have that case reviewed in a court of appeal, if so advised, for it is said that, "The defendants be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a *bond fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a court of co-ordinate jurisdiction, could not so hold; and the defendants have not raised the point for a court of appeal.

I proceed to state the farther facts.

*Hollins innocent of any knowledge of Bayley's title.*  
Hollins, the defendants, as brokers, acting for Messrs. Micholls, and Messrs. Micholls, as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man or, even a dishonest man, if intrusted by the plaintiffs with the possession of the goods, as an agent, for sale.

And the defendants and Micholls were both innocent of any knowledge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the defendants in dealing with Bayley without farther inquiry, nor, *a fortiori*, in Micholls who trusted the defendants to act for him, and dealt with Bayley because the defendants selected him.

Under those circumstances, your Lordships ask the question, whether the plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of

business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman v. Booth*, 1 H. & C. 803, is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiffs' goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs. See *Stephens v. Elwall*, 4 M. & S. 259, and *Garland v. Carlisle*, 4 Cl. & F. 693.

And, accordingly, I think it has not been disputed by any one, that if the plaintiffs had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants Hollins, who honestly handed it to Bayley.

And I take it that if the defendants have done what amounts in law to a conversion, they also must be liable to pay the plaintiffs.

It is hard on them, I agree, but I do not think it is harder than it would have been on Micholls. Indeed, I think, that if the plaintiffs were told that they had recourse, at their option, against either the broker or the spinner they might, without any obvious injustice, have said: Then make the broker pay, for he went to Bayley's, so that if there is any fault it is his.

But we cannot act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton market at Liverpool equivalent to a sale in market overt, the loss would have fallen on the plaintiffs. As it is it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a very considerable extent by the Factors Acts, and it may be expedient to extend that alteration farther, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case,

viz., whether what the defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my Brother BRETT, in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff and some clear for the defendant, and that the difficulties arise in doubtful cases on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord MANSFIELD says, in *Cooper v. Chitty*, 1 Burr. 20; 1 Sm. L. C. 417: "The bare defining of this kind of action and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord MANSFIELD, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods.

And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bonâ fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bonâ fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion; see *Isaack v.*

*Clarke*, 1 Buls. 306, see p. 312; *Vaughan v. Watt*, 6 M. & W. 492. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances, excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And therefore it is no conversion if he *bond fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that, on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bond fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner: see *Heald v. Carey*, 11 C. B. 977; *Alexander v. Southey*, 5 B. & A. 247.

And the same principle would apply to the cases alluded to by my Brother HANNEN in his judgment in the court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a caretaker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' Bar. It was said: "Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?"

I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie* an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the

present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge.

And on the same principle I take it the ruling of Lord TENTERDEN in *Greenway v. Fisher*, 1 Car. & P. 190, may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord TENTERDEN on this ground, but on that of the packer's being a public employment, which I think my Brother BRETT, in his judgment below, correctly shews to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or innkeeper, bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In Comyns' Digest, Action on the Case — Trover, E., it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion:" Per BERKLY, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or suppose the plaintiffs in the case at your Lordships' Bar had, for some reason, brought the action against Micholls' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavour to answer it. I think it is not necessary now to do so, for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my Brother CLEASBY's judgment below, that the defendants themselves were the purchasers from Bayley, for though, if it were left to me to draw inferences of fact, I should draw that inference, I doubt if it is open to me so to do after the finding of the jury affirming that the defendants were agents. But though it is to be taken in favor of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in chang-

ing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material: see *Parker v. Godin*, 2 Str. 813. There, "the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court, a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use."

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens v. Elwall*, 4 M. & S. 259, where Lord ELLENBOROUGH says: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the defendant in *Stephens v. Elwall* can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover: see *Garland v. Carlisle*, 4 Cl. & F. 693. The Legislature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in market overt, and to persons dealing with agents intrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed by the Lord Chief Baron, Law Rep. 7 Q. B. 641, that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law as it exists does not protect such brokers.

The conversion in the case of *Stephens v. Elwall*, 4 M. & S. 259, consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defendant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought them from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord ELLENBOROUGH.

The conversion in the present case consists in, by means of the

delivery order, transferring the goods from Bayley to Micholls with intent to transfer *de facto* Bayley's property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens v. Elwall* may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross v. Johnson*, 5 Burr. 2825, cited by my Brother BRETT, is not in point. There the defendant had received goods as plaintiff's warehouseman. They were lost, and the ruling of the court was, that though an action might lie for negligence, if there was any, there was no conversion.

The *Lancashire Wagon Company v. Fitzhugh*, 6 H. & N. 502, was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiffs' interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to plaintiffs' interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who uses the goods is, makes against the defendants.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

MR. JUSTICE BRETT. . . . I submit, therefore, that the very foundation of this case is that the defendants made the contract as agents and brokers only, and that they did not buy or sell as principals, and that in obtaining the sampling order and sample, and in obtaining or signing the delivery order, and in receiving and forwarding the cotton, they acted, so far as knowledge or recollection and intention went, merely as agents for Micholls, Lucas, & Co., to examine for them, to receive for them, to forward to them, goods assumed at the time to be their goods without any reference to the contract by which the goods became theirs. The question of law is, whether such dealing with goods can lay a mere agent open to an action of trover. The question in business, and it is a most important one for Liverpool, is, whether the cotton brokers of Liverpool may with safety, so long as they do no more, add to their proper function of brokers the business of forwarding cotton to the Liverpool stations for their clients. If they may, it seems to be an addition to their business of mere brokers innocent as regards others, and convenient for them and their clients. If the brokers may not safely perform this small function of forwarding to the station, another

agent must be introduced by the country principal to do it, to the great inconvenience of such principal.

The real question, which I cannot doubt it was the intention of Justice WILLES to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interfere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron MARTIN and the other barons in the case of *Burroughes v. Bayne*, 5 H. & N. 296. In that case Baron MARTIN says, 5 H. & N. 302, 303: "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Farther on he explains what he intends by this. He quotes from the judgment of ALDERSON, B., in *Fouldes v. Willoughby*, 8 M. & W. 540, thus: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion." "I," says MARTIN, B., "entirely accede to this view of the law, which is simple and of easy application." It is obvious that MARTIN, B., took a very large view of the term "conversion." And that the question of the right interpretation of the term is very important, for upon it may depend whether a defendant is to be held liable in trover for the full value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes v. Bayne*, 5 H. & N. at p. 305, CHANNELL, B., says: "I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion, I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favour of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having farther use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." BRAMWELL, B., says, 5 H. & N. at pp. 308, 309: "It certainly is not



every detention of goods, although there is no right to detain them, that is a conversion, in my judgment at all events." Again: "The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." Again: "If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word 'conversion,' the defendant is made liable for the value of the billiard table, which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff, etc." In the judgment in the Exchequer Chamber, MARTIN, B., repeated the same view of a conversion which he had stated in *Burroughes v. Bayne*, 5 H. & N. 296: "But as regards the action of trover," he says, "I think it is well settled that the assumption and exercise of dominion — and asportation is an exercise of dominion — over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person." Now the greater part of the propositions thus enunciated by MARTIN, B., are identical with the propositions of the other judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsistent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to the possession of them of his dominion over them is a conversion, if by the word "dominion" in the last proposition is intended "title as owner." The essential difference between the view of Baron MARTIN and the other judges I have mentioned is in the sense in which this word "dominion" is used by him and them. When Baron MARTIN speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other judges mean an interference or dealing with, or doing some act in negation of, the title as owner of the true owner. Baron MARTIN holds that every asportation or detention which cannot be justified, *i.e.*, which is not done for the true owner, is a conversion. Baron CHANNELL and Baron BRAMWELL hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question in this case is, what is the proper definition of the term "conversion" in a case in which an asportation of the chattel is relied on as the conversion. If the first finding is to be treated as a

binding decision that the defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgment below. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of MARTIN, B., is preferred to that of BARONS BRAMWELL and CHANNELL. It cannot fail to be observed that the definition of MARTIN, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and refusal; and that in order to meet the difficulty, he, in his judgment in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway v. Fisher*, 1 C. & P. 190, is wrongly decided. I endeavoured in the Exchequer Chamber to explain all the cases which are called exceptional, by shewing that the definition of a conversion laid down by BRAMWELL and CHANNELL, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much farther upon this point than I endeavoured to do in that judgment, to which I beg to refer. In addition, however, I may say that in *Simmons v. Lillystone*, 8 Ex. 437, PARKE, B., says: "Here the defendant never intended to take to himself any property in the timber," and, "We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." If the last phrase be expanded, it clearly means "or to deprive the plaintiff of the property in the goods." In CHITTY on Pleading, vol. 1, tit. Trover, p. 172, ed. 1844, it is said: "There may be a conversion, 1st, by wrongfully taking a personal chattel; 2ndly, by some other illegal assumption of ownership, or by illegally using or misusing goods; or 3rdly, by a wrongful detention." Looking to the phraseology of the second branch, which speaks of "some other assumption of ownership," it is obvious that the taking in the first branch is a taking as in right of ownership in the defendant, or in some one other than the plaintiff. In explaining the second branch, the learned author says: "So the wrongful assumption of the property in goods may be a conversion of itself, or the wrongful assumption of a right of disposing of them." And under the latter, he gives as instances a wrongful user of the goods, *i.e.*, I apprehend, a user as if the defendant or some one other than the plaintiff were the owner, and a misuser by the defendant, as by breaking bulk, or consuming, or transforming, which are

all cases of the exercise of acts as of ownership. It seems apparent to me that a claim or exercise of ownership is throughout in the mind of the author as the reason of his producing the cases as examples of "actual conversion." And then he proceeds to the third head, and says: "A demand and refusal are necessary in all cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct 'actual conversion.'" That is to say, as it seems to me, that in order to prove a conversion, you must give evidence either of "an actual conversion," which consists in the defendant taking or using the goods with the intent to exercise an act of ownership on his own behalf, or of some one other than the plaintiff, or of a conversion by reason of a refusal on demand. I conclude, therefore, as before, that the defendant cannot be properly made liable in trover on the first part of the leave reserved in this case, because he was acting only as a broker, to make a contract between other parties, and none with himself; nor on the second part of the leave reserved, because the court was bound to treat the asportation, which was relied on as an actual conversion, as a simple asportation made without intent to interfere in any manner with the title of or ownership in the cotton. I cannot agree with the view which seems to me to be expressed by MARTIN, B., in *Burroughes v. Bayne*, 5 H. & N. 296, that the action of trover is equivalent to an action of trespass, and was invented in order to replace the action of detinue, avoiding only the right of the defendant to wage his law. I believe that it was invented in order to provide a remedy in damages, where there has been a trespass, and more than trespass to goods, namely, acts done with the intention of transferring or interfering with the title to or ownership of them, or which are done as acts of ownership of them, or where without an original trespass there have been acts done with the intention of transferring or interfering with the title to or ownership of them, or which have been done as acts of ownership of them. I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion. I answer your Lordships' question by saying that in my opinion the judgments in the Court of Queen's Bench and Exchequer Chamber ought to be reversed, and that judgment in the action ought to be entered for the defendants.

NOTE. — A majority of the judges concurred in the conclusion reached by Mr. Justice BLACKBURN.

*Rice v. Yocum*, 155 Pa. 538. An agent who buys for his principal the chattels of the plaintiff from one who had no authority to sell them, and delivers them to his principal, converts the chattels.

## HIORT v. BOTT.

L. R. 9 Exch. 86. 1874.

ACTION of trover for barley, tried before ARCHIBALD, J., at the Staffordshire Summer Assizes, 1873.

The facts were as follows: The plaintiffs, who were corn merchants, trading under the name of Brochner and Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, forwarded to the London and North Western Railway station at Birmingham 83 quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to the order of consignor or consignee." The barley had in fact never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmett. A day or two after the receipt of these documents by the defendant, Grimmett called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you of Brochner and Co." Grimmett said "it was a mistake of Brochner and Co.; they had no doubt confused the defendant's name and some other name; they were doing a large business, and might have made a mistake." Grimmett then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmett, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for 180*l.*, the value of the barley. A rule having been obtained accordingly.

BRAMWELL, B. This case was argued before my Brothers PIGOTT and CLEASBY and myself, and we are all of opinion that the rule must be made absolute. [After stating the facts the learned judge proceeded:—]

I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conver-

sion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use"; but that does not mean that the defendant consumed the goods himself; for, if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus: that by an unauthorized act on the part of the defendant, the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street? That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it — that is, to send it back by a trustworthy person? And when you say, "Go and deliver it to the person who sent it," are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett's request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is therefore a distinction between the case put and the present one. And there is also a distinction between the case of *Heugh v. London and North Western Ry. Co.*, Law Rep. 5 Ex. 51, which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person apply-

ing for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: "We, the plaintiffs, had at the London and North Western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing with it. Nevertheless, you ordered the London and North Western Railway Company to deliver it, without any authority, to Grimmitt, who took it away." Would not that have been a logical and precise statement of a tortious act on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs.

NOTE. — See, *accord*, *Knapp v. Guyer*, 75 N.H. 397.

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STEPHENS v. ELWALL.

4 M. & S. 259. 1815.

TROVER for goods. Plea, not guilty. At the trial before LE BLANC, J., at the last Lancaster assizes the case was this:

The bankrupts being possessed of the goods in question sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. The learned judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict for the defendant. And upon a rule *nisi* obtained in the last term for a new trial, in order to question the accuracy of the learned judge's direction in point of law, *Perkins v. Smith*, 1 Wils. 328, was cited, and it was contended that the defend-

ant being a tort-feazer, no authority that he could derive from his master would excuse him from being liable in this action.

Lord ELLENBOROUGH, C.J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

*Control*  
NOTE. — In *Leuthold v. Fairchild*, 35 Minn. 99, the court said (p. 111): "We hold the rule of law to be that an agent or servant who, acting solely for his principal or master, and by his direction, and without knowing of any wrong, or being guilty of gross negligence in not knowing of it, disposes of, or assists the master in disposing of, property which the latter has no right to dispose of, is not thereby rendered liable for the conversion of the property."

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### GURLEY v. ARMSTEAD.

148 Mass. 267. 1889.

TORT for the conversion of certain articles of personal property belonging to the plaintiff. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, which, so far as material, appears in the opinion.

DEVENS, J. The defendant, who was a job teamster, removed the goods alleged to have been by him converted from a room in the dwelling-house of one Whittier to the store of one Davis, and there delivered them to Whittier, by whose direction he had acted. Although the goods were in the house of Whittier, they were in a room hired by the plaintiff from him. The contract between them was one for rent, and not for storage, Whittier reserving no control over the room. It was, however, neither locked nor fastened, although no goods were in it except those of the plaintiff. In all that he did the defendant acted in good faith, without any intention of depriving

the rightful owner of her property, and in ignorance of the fact that the plaintiff was such owner, neither asserting title in himself nor denying title to any other, nor exercising any act of ownership except by the removal above stated.

The legal possession of the goods was, under these circumstances, undoubtedly in the plaintiff, and as they were in the room hired by her, the actual possession was also hers. The apparent control of them was, however, in Whittier, as they were in his house, and he had further the present capacity to take actual physical possession, as the room in which they were was neither locked nor fastened.

It is conceded that whoever receives goods from one in actual, although illegal, possession thereof, and restores the goods to such person, is not liable for a conversion by reason of having transported them. *Strickland v. Barrett*, 20 Pick. 415; *Leonard v. Tidd*, 3 Met. 6. And this would be so apparently, even if the goods thus received were restored to the wrongful possessor, after notice of the claim of the true owner. *Loring v. Mulcahy*, 3 Allen, 575; *Metcalf v. McLaughlin*, 122 Mass. 84.

Upon the precise question raised, we have found no direct authority, nor was any cited in the argument; but the principle on which the decisions above cited rest is not unreasonably extended when it is applied to the circumstances of the case at bar. The act of removing goods by direction of the wrongful possessor of them is an act in derogation of the title of the rightful owner; but the party doing this honestly is protected because from such actual possession he is justified in believing the possessor to be the true owner. He does no more than such possessor might himself have done by virtue of his wrongful possession.

The defendant was a job teamster, and thus in a small way a common carrier of such wares and merchandise as could appropriately be transported in his team or wagon. He exercised an employment of such a character that he could not legally refuse to transport property such as he usually carried, which was tendered to him at a suitable time and place with the offer of a reasonable compensation. If he holds himself out as a common carrier, he must exercise his calling upon proper request and under proper circumstances. *Buckland v. Adams Express Co.*, 97 Mass. 124; *Judson v. Western Railroad*, 6 Allen, 486. His means of ascertaining the true title of the freight confided to him are of necessity limited. He must judge of this as it is fairly made to appear. If Whittier had actually gone into the room, as he might readily have done, and taken physical possession of the goods, the defendant upon well-established authority would have been justified in obeying the order, and transporting the goods to Whittier at another place; and he should not be the less justified where Whittier, in apparent control of the goods in his own house, and capable

*Rule*



of immediately taking them into his actual custody by entering the room through the unlocked door, has directed the removal.

If a person standing near and in sight of a bale of goods lying on the sidewalk belonging to another, and thus in the legal possession of such other, is able at once to possess himself of it actually, although illegally, and directs a carrier to remove it and deliver it to him at another place, compliance with this order in good faith cannot be treated as a conversion; and apparent control, accompanied with the then present capacity of investing himself with actual physical possession, must be equivalent to illegal possession in protecting a carrier who obeys the order of one having such control.

*Judgment for the defendant.*

NOTE. — See, *accord*, *Nanson v. Jacob*, 93 Mo. 331, 339; *Greenway v. Fisher*, 1 C. & P. 190. Note the remarks of Mr. Justice BLACKBURN in *Hollins v. Fowler*, *supra*, as to the liability of common carriers.

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BURDITT v. HUNT.

25 Mo. 419. 1845.

TROVER for certain goods. It appeared from the evidence, that the property was left in the possession of Kellen, the mortgagor, with authority to sell as agent for the plaintiffs, for cash and in small parcels. The sale of part of these goods by Kellen to Hunt, under which he claimed, was not within the authority, and the plaintiffs refused to ratify it. The exceptions state, that it was contended on the part of McMullen, the other defendant, that he, as servant of Hunt, ignorant alike of the existence of the mortgage and of the terms of the contract of sale by Kellen to Hunt, and of any circumstances tending to show, that the sale was invalid, was sent by Hunt to bear the articles from Kellen's shop to Hunt's; that as Hunt's servant he received them from Kellen, and deposited them in Hunt's shop, and had no further connexion with them; and that therefore he was not liable to the plaintiffs in this action. The exceptions, also, state, that there was evidence in the case tending to sustain McMullen's position.

The presiding judge instructed the jury, that the mortgage vested in the plaintiffs title to all the goods in Kellen's shop on the first day of February; and that if Hunt was liable in this action, and McMullen as his servant aided him in removing the goods, then McMullen was liable for all the goods he so removed.

The verdict was for the plaintiffs, and the defendants filed exceptions.

SHEPLEY, J. The goods having been left in the possession of the mortgagor with authority to sell them for cash in small parcels, he sold and delivered those, for which this action was brought, to the defendant, Hunt; but in so doing exceeded his authority. There was testimony tending to prove, that the other defendant, McMullen, as the servant of Hunt, was sent for them, and that he received them by the delivery of the mortgagor, and deposited them in Hunt's shop; that he was ignorant of the existence of the mortgage and of the terms of the sale to Hunt; and that he had no other connexion with them.

The jury were instructed, if Hunt was liable, and McMullen, as his servant, aided him in removing the goods, he would be liable for those which he removed. A servant, who receives goods delivered to him and carries and delivers them to his master, can be held responsible for them in action of trover, only, on the ground, that such a removal of them amounts to a conversion. If such a position could be maintained, common carriers and other persons, by receiving goods delivered to them by a person in possession of them, and carrying them to another place, would thereby be made liable for their value, if it should afterward be made to appear that the goods were delivered without authority from the owner. And yet the possession of personal property is, *prima facie*, evidence of ownership. Such a position cannot however be sustained. Conversion is the gist of the action of trover; and conversion is a tort. *Draper v. Fulkes*, Yel. 165; *Fuller v. Smith*, 3 Salk. 366. When goods come to the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act. 2 Saund. 47, e. *Mulgrave v. Ogden*, Cro. Eliz. 219.

The reception of them by delivery from one whom he is entitled to regard as the owner, and the conveyance from him to another, to whom they are sent, are not tortious acts. In the case of *Parker v. Godin*, 2 Strange, 813, the defendant, who acted as the friend or servant of another, was held liable in such an action, because he pawned the goods in his own name, which had been improperly delivered to him. In the case of *Perkins v. Smith*, 1 Wil. 328, a bankrupt after the act of bankruptcy delivered goods to a servant to be carried to his master, and the servant sold them for his master's use, and was held to be liable for them in such an action. In both these cases the servant was considered to be liable only on the ground, that they committed tortious acts by pawning and selling the goods. A refusal to deliver goods on a demand made by the owner may be a tortious act and a conversion by one who is in possession of them. There is no evidence exhibited in this case tending to prove that the servant committed any tortious act; or that he assisted his master in such an act.

*Exceptions sustained, and new trial granted.*

*Primer*

## LEONARD v. TIDD.

3 Met. (Mass.) 6. 1841.

TROVER for a gun, alleged to have been converted by the defendants, on the 9th of December, 1839.

At the trial in the court of common pleas, it was proved that the gun was the property of the plaintiffs. Evidence was introduced tending to show that Jerry Leonard, a person employed in the plaintiffs' service, was in the habit of using the gun, and that he frequently offered to sell it; that he was indebted to the defendants, who were partners in trade, and left the gun in their hands, in October, 1839, as security for the debt; that, during the same month, he sold and delivered the gun to Allen Pratt, who has ever since retained the same; and that the plaintiffs, on the 10th of December, 1839, demanded the gun of Tidd, one of the defendants.

The evidence, as to the said sale, tended to prove "that the bargain for the gun was made between said Jerry and Pratt, at the defendants' house; that Jerry wished Pratt to buy the gun and pay \$5 for it to the defendants, to which Pratt assented, if the defendants would take him as paymaster for that sum; that Jerry thereupon asked Clapp, one of the defendants, if he would take Pratt as paymaster for \$5, towards the sum which Jerry owed the defendants, and for which the gun was pledged to them, and that Clapp agreed so to do; and that Jerry thereupon took the gun from a room in the defendants' house, and delivered it to Pratt."

The plaintiffs did not rely upon their demand of the gun, to charge the defendants with a conversion, but upon the sale thereof made to Pratt. The defendants contended, that if said sale were made by their permission, yet that they could not be charged in trover, inasmuch as the gun was put into their hands by said Jerry, who was in possession thereof, and they supposed it to be his property, and parted with it on the belief that he had a right to dispose of it. But the court ruled otherwise. The defendants' counsel requested the court to instruct the jury, "that if the defendants did nothing towards the sale, except to assent to it so far as to agree to accept, in pay for their claim against Jerry, the sum for which he sold the gun, it would not be a conversion." But the court ruled that it would be a conversion.

The jury found a verdict for the plaintiffs, and the defendants alleged exceptions to the ruling of the court.

WILDE, J. The only question in this case is, whether the facts proved at the trial do in law constitute a conversion, as charged in the writ. The case is trover for the conversion of a gun, which the defendants admit was the property of the plaintiffs. It was proved that one Jerry Leonard, being indebted to the defendants, delivered the gun

to them as security for the debt, and that afterwards the plaintiffs demanded the gun of one of the defendants. But the plaintiffs do not rely on this demand as evidence of a conversion; as the gun, before the demand, had been taken away by said Jerry, with the defendants' consent, and had been sold by him to one Pratt. The only evidence, relied on to prove a conversion by the defendants, is the proof that this sale was made with their consent. It was proved that the bargain for the gun was made between the said Jerry and Pratt, and that Pratt agreed to purchase the gun for the sum of five dollars, to be paid to the defendants, if they would consent to take him as paymaster; to which the defendants assented. There was no proof that the defendants had any knowledge that the gun was the plaintiffs' property, or any reason to suppose that it was not the property of Jerry. But it was ruled by the court that this sale, with the permission of the defendants, would be a conversion by them, although they supposed that the gun belonged to Jerry at the time. It is now contended by the plaintiffs' counsel, that the jury had a right to infer from the evidence that the defendants joined in the sale; but we think no such inference can be made; and it is not to be supposed that it was made by the jury. For it was ruled by the court, that the assent to the sale, by the defendants, and their agreeing to receive the purchase money, would amount to a conversion. The only evidence against the defendants was, that they received the gun as a pledge from Jerry, and afterwards restored it to him and took other security, and that the gun was sold by Jerry.

The receiving of the gun from the person who had the possession, and restoring it to him, under the circumstances proved, cannot be considered as a tortious act, and does not amount to a conversion. We think, therefore, on the evidence reported, this action cannot be maintained. *New trial ordered.*

NOTE. — *A fortiori*, mere taking and holding as a bailee is not a conversion. *Deering v. Austin*, 34 Vt. 330.

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NELSON v. IVERSON.

17 Ala. 216. 1850.

THIS was an action of detinue instituted by the plaintiff against the defendant in error to recover two slaves, which he claimed by virtue of a parol gift from his uncle, Garland Dawkins. The proof tended to show that in 1823 the said Garland Dawkins gave a slave by the name of Lucy and the mother of those sued for to the plaintiff, who was then an infant, and delivered possession to his mother, Mrs. Martha Nelson; that Mrs. Nelson retained the possession of Lucy

until 1830, when the said Garland Dawkins obtained the possession of her from Mrs. Nelson, and retained it until his death in 1838; that the defendant in 1848 hired the slaves sued for, who are the children of Lucy, from the widow of Garland Dawkins, under an express agreement that he would deliver them to her at any time that she should think proper to demand them; and that she demanded and retook the possession of them before the institution of this suit, but not before the defendant had notice of plaintiff's claim. The court gave two charges to the jury, which in substance affirmed the proposition that although the jury should believe that the slaves sued for were the property of the plaintiff, yet if the defendant hired them from the widow of Garland Dawkins under an agreement that he was to re-deliver them to her on demand, and they were re-delivered to her on such demand before the institution of this suit, the plaintiff is not entitled to recover, notwithstanding the defendant may have had notice of his claim before he gave up the possession of the slaves.

CHILTON, J. As this case must go back for another trial, it is unnecessary for us to give to the charges of the court which were excepted to, a critical examination. It will be sufficient for the further action of the court below that we state the law upon the point raised by the charges. It cannot be the law, that if the way-faring man stop at my house and I extend to him the usual civilities and courtesies of life, feed his horse and take charge of his baggage, that after I have restored to him his horse and baggage, without notice or demand of the true owner, I should be liable in detainue or any other action for the property thus temporarily in my possession. The application of such a principle, as has been justly remarked, "would bring about a state of distrust and suspicion tending to destroy the courtesies of life, and to clog the business transactions of society." — Per UNDERWOOD, J., dissenting, 1 Dana's Rep. 122. We take the true doctrine to be this: If the bailee have the temporary possession of property, holding the same as the property of the bailor and asserting no title in himself, and in good faith in fulfilment of the terms of the bailment, either as expressed by the parties or implied by law, restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty. Whether, if a bailee sell the goods to a third person by virtue of a supposed authority derived from the constituent, when such principal having no title could confer no authority, he would be liable, is a question outside the facts of this case, and one which we do not decide. All we assert is, that if the defendant in this case, in good faith, hired the property in dispute, and before the true owner asserted his claim had honestly restored it to the bailor, not having put it out of his possession for the purpose of avoiding this action of detainue, he is not liable to the owner of the property in this suit.

NOTE. — *Loring v. Mulcahy*, 3 All. (Mass.) 575. The court held that a depositary who returns chattels to his depositor, knowing they are not the chattels of the depositor, has not converted them.

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HUDMON v. DUBOSE.

85 Ala. 446. 1888.

APPEAL from the Circuit Court of Lee.

Tried before the Hon. JESSE M. CARMICHAEL.

This action was brought by E. P. DuBose against the appellants, to recover damages for their alleged conversion of two bales of cotton; and was commenced on the 15th April, 1881. The defendants pleaded not guilty, and a special plea averring that they received the cotton as warehousemen, for storage only, and delivered it up on production of their receipt, without notice of plaintiff's right or claim; and issue was joined on both of these pleas. The cotton was raised in Macon county, during the year 1880, on lands cultivated by F. D. May and B. A. Roberts; and it was carried by one of them, in company with W. R. Chapman, on the 6th November, 1880, to Opelika, in Lee county, and there stored in the warehouse of the defendants, who gave a warehouse receipt for it; and they delivered it, a few days afterwards, to some third person, whose name does not appear, on his production of the receipt. The plaintiff claimed the cotton under two mortgages executed to him by said May and Roberts, which were read in evidence without objection. These mortgages were given for advances to make a crop, on certain lands in Macon county; each being dated June 1st, 1880, and conveying, with other personal property, the entire crop of cotton to be raised on said lands during that year. Each of said mortgages was duly recorded in Macon county, in July, 1880, and the law-day of each was October 1st, 1880. The plaintiff, learning that the cotton had been carried to Opelika, went to that city on the 16th November, and made inquiry at the different warehouses; and he was informed by the defendants, after examining their books, that the cotton had been stored with them for a few days, and that they had delivered it to a person who produced their receipt to Chapman; but they declined to state the name of that person. The defendants, it is stated, had no previous acquaintance with plaintiff, never saw him before, and had no actual notice of his right to claim the cotton; and it is further stated, also, that "there was no evidence showing the indorsement in writing of said cotton receipt."

On these facts, "there being no conflict in the evidence, the court charged the jury, among other things, that the recording of said mortgages in Macon county was such notice as would make the de-

fendants liable, if the jury should believe from the evidence that the cotton was raised, on the lands described, during the year 1880; although they might also believe that the defendants only received the cotton as warehousemen on storage only, and never claimed any other control over it than as warehousemen, and never knew, as fact, during the time they held it, that plaintiff had or made any claim to it." The defendants excepted to this charge, and they here assign it as error, together with the refusal of several charges asked by them.

SOMERVILLE, J. In *Lee v. Matthews*, 10 Ala. 682; s.c. 44 Amer. Dec. 498, decided as far back as 1846, the rule was settled by this court, in accordance with the English authorities, that an agent, who intermeddles with the goods of another, is guilty of a conversion, if the same act of intermeddling by his principal would, under like circumstances, have rendered the latter liable in *trover*. It was said by ORMOND, J., that "every act of intermeddling with the goods of another is a conversion; and it is no answer to the true owner, that the person so receiving the goods was ignorant of his title, or that he received them for the use or benefit of another." The same rule is reiterated in *Perminster v. Kelly*, 18 Ala. 716, decided in 1851, and is fully sustained by the weight of authority. *Marks v. Robinson*, 82 Ala. 69, 83.

The only exception to this rule, which our decisions have established, is stated in *Nelson v. Iverson*, 17 Ala. 216, the authority of which is recognized in *Marks v. Robinson*, *supra* (1886). This exception is, that the mere receiving of goods by one who *restores* them to his bailor, before notice that such bailor's possession was wrongful, is not a conversion.

Under the above principles, the appellants were clearly guilty of a conversion, in receiving the appellee's cotton and shipping it on his order, unless they come within the exception announced in *Nelson v. Iverson*, *supra*. It is insisted in argument, that such shipment is legally tantamount to restoring the cotton to the possession of the bailor. The rule, in our judgment, can not be construed to go this far. The exception in question only embraces the act of restoring the thing bailed to the mere possession of the bailor — a substantial restoration of the original *status in quo* of the property. It does not include a restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach. And such is the act of conversion here imputed to the appellants. The rulings of the Circuit Court touching this point are, in our opinion, free from error.

The registration of the appellee's mortgage on the cotton in controversy was constructive notice to the appellants of the existence of the mortgage, and as binding on them as actual notice would have

been. *Mayer v. Taylor*, 69 Ala. 403; s. c. 44 Amer. Rep. 522; *Heflin v. Slay*, 78 Ala. 180; *Marks v. Robinson*, 82 Ala. 69.

*The judgment is affirmed.*

NOTE. — *Hill v. Hayes*, 38 Conn. 532. A placed certain money, which he had stolen, in the hands of B as a depositary, and B afterwards delivered the money to C, with instructions to deliver it to A. The court held that this was not a conversion by B, even if, at the time of the delivery to C, B had a suspicion, founded on reasonable or probable cause, that the money had been stolen by A.

In *Parker v. Lombard*, 100 Mass. 405, the court said (p. 408): "If the bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion."



*D. Riddance of the Possession.*

## STEVENS v. CURTIS.

18 Pick. (Mass.) 227. 1836.

IN this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion.

NOTE. — See, *accord*, *Wilson v. McLaughlin*, 107 Mass. 587, 590; *Bonney v. Smith*, 121 Mass. 155; *Medlin v. Balch*, 102 Tenn. 710, 712; *Tobin v. Deal*, 60 Wis. 87, 91.

See also *McGonigle v. Belleisle Co.*, 186 Mass. 310.

## GILSON v. FISK.

8 N.H. 404. 1836.

THIS was an action upon the case. The declaration alleged, that whereas, on the 22d July, 1834, a flock of sheep, the property of the plaintiff, were in a certain close of the defendant, in Dunstable, and the defendant drove the said sheep from his close aforesaid, the defendant wrongfully and injuriously, and intending to injure the plaintiff, continued to drive and did drive the said sheep to a great distance, to wit, a distance of three miles, and away from the habitation of the plaintiff, in consequence of which eight sheep were lost, and the plaintiff put to great trouble and expense in looking for the same.

RICHARDSON, C.J., delivered the opinion of the court.

It is alleged by the plaintiff that the sheep were in the close of the defendant, and that the latter drove them out. *Prima facie*, when the sheep of one man are in the close of another, the owner of the close has a right to drive them out. We must, therefore, understand in this case, that when the defendant drove the sheep from his pasture, he was exercising a license which the law allowed. But it is farther alleged, that having driven the sheep from the pasture, the defendant undertook to drive them away to a great distance. This, in our opinion, was an abuse of the license by law allowed, which made him a trespasser, *ab initio*. When one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for an unlawful conversion of the horse. *Wheelock v. Wheelwright*, 5 Mass. R. 104. And an act which if done in abuse of an authority given by an individual, amounts to a conversion, will, when done in abuse of an authority given by law, make the party a trespasser *ab initio*.

SECTION 5.  
USING THE CHATTEL.

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WOODMAN v. HUBBARD.

25 N.H. 67. 1852.

THE second count was in trover for an alleged conversion of the horse.

The defendant, on Sunday, hired the plaintiff's horse to go from the Great Falls Village to South Berwick Village, and agreed to pay a stipulated price therefor. He drove the horse to South Berwick Village and thence to another place some miles beyond. He returned with the horse to Great Falls Village on the evening of the same day, and re-delivered the horse to the plaintiff. The horse died the next day. There was evidence tending to show that the death of the horse was occasioned by the unreasonable and immoderate driving of the defendant. The defendant contended that the plaintiff could not recover, as the horse was let under a contract made on Sunday, and for the purpose of performing a service on that day.

PERLEY, J. The action of trover is founded upon property in the plaintiff, and a conversion by the defendant. A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property. If one hire a horse to be driven to one place, and voluntarily drive him to another, it is a conversion, and trover will lie. *Wheelock v. Wheelwright*, 5 Mass. 104.

This is in accordance with the law in other cases, where the bailee for one purpose diverts the thing bailed to another; as where a carrier uses, or sells, or delivers to the wrong party, the commodity which he received to transport. The circumstance that the property is in the hands of the bailee with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete, when the bailee goes beyond his license and duty, as if the control over the property were usurped without any bailment. There can be no doubt, on the authorities, that trover would be a proper remedy in this case, if the illegality of the contract, on which the defendant took the horse into his possession, had not been set up as a defence.

If, however, though there has been in this case a technical, legal conversion, the real and substantial claim of the plaintiff is merely to recover damages for the breach of an illegal contract; if he must, notwithstanding the form of his action, claim in fact by and through

his contract, he cannot evade the consequences of his illegal act by adopting a fictitious action, allowed in ordinary cases for the purposes of the remedy. In some cases the plaintiff, for convenience of his remedy, when his claim arises under a contract, is allowed to allege his *gravamen* in a criminal neglect of duty in the manner of performing, or in neglecting to perform, the contract. *Govett v. Radnidge*, 3 East, 62. But in such case, by varying the form of the remedy, the plaintiff cannot deprive his adversary of any defence, such as infancy, which he might have set up, if the claim had been made for a breach of the contract. *Jennings v. Randall*, 8 T. R. 335; *Green v. Greenbank*, 2 Marshall, 485 (4 C. L. 375); *Fitts v. Hall*, 9 N.H. Rep. 441.

The question, then, becomes material whether the only real injury which the plaintiff suffered was by a breach of the contract; or whether the driving of the horse to another place was a substantial invasion of the plaintiff's right of property.

When the defendant voluntarily drove the horse beyond the limits for which he was hired, he acted wholly without right. He then took the horse into his own control, without any authority or license from the owner. The conversion was in law as complete, the wrongful invasion of the plaintiff's right of property was as absolute as if, instead of driving the horse a few miles beyond the place for which he had hired him, he had detained and used him for a year, or any other indefinite time, or had driven him to market and sold him. If taking the wrongful control of the horse, and driving him ten miles, was not a substantial conversion, how far must the defendant have driven him? how long must he have detained him? and what other and further wrongful acts was it necessary that he should do, in order to make himself a substantial and real wrong-doer? It would seem to be quite clear, that if the original act, assuming control over the horse, was not a substantial invasion of the plaintiff's right of property, no subsequent use or abuse of the horse by the defendant could make it so; and that if the defendant cannot on the facts of this case be charged for the conversion of the horse, he could not have been if he had sold or wilfully destroyed him.

NOTE. — See, *accord*, *Fail v. McArthur*, 31 Ala. 26, 32; *Morton v. Gloster*, 46 Me. 520; *Horsely v. Branch*, 1 Humph. (Tenn.) 199; *Hart v. Skinner*, 16 Vt. 138, 144.

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### HOOKS v. SMITH.

18 Ala. 338. 1850.

PARSONS, J. The defendant below having hired the slave for house service, afterwards put her as a hand upon the plantation, and in

that business she lost her life. For this he was clearly liable for her value. It is said by Judge STORY that "there is, on the part of the hirer, an implied obligation, not only to use the thing with due care and moderation, but also not to apply it to any other use than that for which it is hired," and he adds, that if the thing is used for a different purpose than that which was intended by the parties, the hirer is responsible for all damages, and if a loss afterwards occurs, although by inevitable casualty, he will generally be responsible therefor.

NOTE. — See, *accord*, *Palmer v. Mayo*, 80 Conn. 353, 356; *Kelly v. White*, 17 B. Mon. (Ky.) 124; *Lucas v. Trumbull*, 15 Gray (Mass.) 306; *Fisher v. Kyle*, 27 Mich. 454; *McCurdy v. Wallblom Co.*, 94 Minn. 326; *Beach v. Raritan R.R. Co.*, 37 N.Y. 457, 468; *Lane v. Cameron*, 38 Wis. 603.

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FARKAS v. POWELL.

86 Ga. 800. 1891.

SIMMONS, J. Powell hired from Farkas a horse to ride from Albany to the Whitehead place, in the country, a distance of five miles, and was to return by eleven o'clock at night. When he arrived at the Whitehead place, he learned that the person he wished to see was at the Bryant place, three or four miles beyond, and he rode on to that point. He remained at the Bryant place some two hours and a half, and left there for Albany about half past nine in the evening. On his return, and after getting between the Whitehead place and Albany, the horse fell in the road. After considerable trouble, he got the horse on his feet and led him about three miles, and when within about a mile of Albany, the horse again fell, and he had to obtain the assistance of two colored men living near by, to again get the horse upon his feet. He then took the horse to the lot of one of these men and left him there, and about daylight in the morning, walked on to the town and notified Farkas's stable-man where the horse was and of his condition. The horse died within a day or two thereafter. Farkas brought suit against Powell, alleging, in substance, that he had ridden the horse three miles beyond the place he had hired him to go, and that by negligence or cruelty the horse had been so injured that he died. The evidence for the plaintiff tended to show that on the afternoon when the horse was hired to Powell, it was sound and in good condition, moved off briskly down the street and showed no signs of any disease, but that when returned the next morning, it was lame and could scarcely walk and had a halter burn around one of its feet. The evidence for the defendant tended to show that he rode the

horse moderately, never going faster than a trot, that at the Bryant place he hitched it to a post, that there was no halter or rope around its foot while in his possession, and that in returning from the Bryant place he rode the horse in a walk until it suddenly fell in the road. An expert in diseases of horses testified that in his opinion the horse was paralyzed, and that this may have been produced by straining. There was also evidence that, a day or two before the hiring, the horse had been used in hauling dirt. Powell also testified that, about a year before, he had hired another horse from Farkas to go to the same place, and rode three or four miles farther than he intended to go, and that when informed of it on his return, Farkas said it was all right, and did not charge him for the extra time or distance.

On this state of facts the trial judge charged the jury, in substance, that if Powell exercised ordinary care in riding the horse and attending to it while in his possession, it did not make any difference whether he rode it beyond the Whitehead place or not; that if Powell was not at fault in riding and in his attention to the horse, he could not be held liable because he went a greater distance than he had hired the horse to go, although it may have been injured by accident or otherwise without his fault in going this extra distance. The jury found for the defendant, and the plaintiff made a motion for a new trial.

We think this charge was error. When Powell hired the horse from Farkas to go five miles to the Whitehead place, he had no right, under his contract, to go beyond that point without the consent of Farkas; and when he did go beyond, it was at least a technical conversion, or a violation of his contract and duty. And if the horse had been injured while beyond the point to which he was hired to go, Powell undoubtedly would have been liable, whether the injury was caused by his own negligence or by the negligence of others, or even by accident; unless he was forced to go beyond that point by circumstances which he could not control. For example, if a bridge had been washed away, or the road was impassable and in consequence he had to take a longer road in order to go to the Whitehead place, he would then be liable only for his own negligence. This principle seems to be sustained by the following authorities: Story on Bailments, § 413 *et seq.*, and authorities there cited; Schouler on Bailments, § 139, and authorities cited. But the nice question in this case is, would Powell, after having been guilty of a technical conversion or violation of his duty and having returned within the limits of the original hiring, and the horse then sustained injury without other fault on his part, be liable? That would depend, in our opinion, upon whether the extra ride of six or eight miles to the Bryant place and back caused or materially contributed to the accident. If it did, we think he would be liable to the owner. The horse might have been well able to travel the five miles and return, but the six or eight miles extra may have fatigued him to such an extent as to have caused him

to stumble and fall, and thus produced the injury. If, however, the extra ride did not cause or materially contribute to the injury, we do not think Powell would be liable, if guilty of no other fault. We can see no good reason to hold the hirer liable for an injury to the horse which occurred, without his fault, after he had returned with it within the limits of his original contract, although he had been guilty of a technical conversion by riding it three miles beyond the point to which it was hired to go, the extra distance not causing or contributing to the injury.

We have been unable to find any case the facts of which are like the facts in this. Nearly all the cases which hold the hirer liable when he has deviated from the terms of his contract, are cases in which he was negligent in fact or wilfully and wantonly misconducted himself, or had overdriven the horse or destroyed or ruined the property while beyond the limits or in the course of deviation from the purpose of the hiring. The cases cited in the brief of counsel for the plaintiff in error were all of this character. See *Mayor, etc. of Columbus v. Howard*, 6 Ga. 213; *Gorman v. Campbell*, 14 Ga. 137; *Collins v. Hutchins*, 21 Ga. 270; *Lewis v. McAfee*, 32 Ga. 465; *Malone v. Robinson*, 77 Ga. 719. So likewise were nearly all the cases referred to in Schouler and Story, *supra*. The facts in those cases show that the property was injured or destroyed during the time it was being improperly used, or being used for a different purpose from that for which it was hired.

The question whether this extra ride did or did not cause or materially contribute to the injury, was for the jury to determine under the evidence and a proper charge by the court; and the court by its charge having eliminated this issue from the case, we think a new trial should be granted.

*Judgment reversed.*

NOTE. — See, *accord*, *Doolittle v. Shaw*, 92 Iowa, 348.

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### HARVEY v. EPES.

12 Gratt. (Va.) 153. 1855.

SLAVES were hired to be worked upon that portion of a railroad lying within the county of Amelia. They were worked upon a portion of the railroad lying within the county of Chesterfield. While being so worked, they died.

MONCURE, J. The court seems to have been of opinion that if the slaves were hired with an agreement that they were to be employed only on that part of the Richmond and Danville railroad which runs through the county of Amelia, and if the hirers in violation of the agreement carried the slaves beyond the limits of the county of

Amelia into the county of Chesterfield, and there worked them on said road; then that such violation was a conversion of the said slaves to the use of the hirers, and rendered them liable for the value of the slaves under the second count of the declaration (which is a count in trover), whether the death of the slaves was occasioned by such violation or not. I will now proceed to enquire as to the correctness of this opinion.

I am of opinion that in the case of a bailment upon hire for a certain term (whatever may be the law in regard to a deposit, a mandate or other gratuitous bailment, or any bailment during the mere pleasure of the bailor, as to which it is unnecessary to express any opinion), the use of the property by the hirer during the term, for a different purpose or in a different manner from that which was intended by the parties, will not amount to a conversion for which trover will lie, unless the destruction of the property be thereby occasioned; or, at least, unless the act be done with intent to convert the property, and thus to destroy or defeat the interest of the bailor therein.

I think the court, instead of that instruction and the instructions numbered two and three, moved for by the plaintiffs in error, ought to have given an instruction to the jury to the following effect: "That if there was a special contract between the plaintiff and the defendants, that the slaves which are the subject of controversy were to be employed on that part of the Richmond and Danville railroad which runs through the county of Amelia only; and if the defendants did carry them beyond the limits of said county into the county of Chesterfield, and there employ them on said road; such wrongful act was not, of itself, a conversion of the said slaves to their use. But if the death of the slaves was occasioned by the said wrongful act, then the said act, in connection with the death of the slaves, was a conversion of them by the defendants to their use, and made them liable, under either count of the declaration, for the value of said slaves: And if such death occurred while the said wrongful act, by which it may have been occasioned, was in operation and force, the burden of satisfying the jury that it was not so occasioned, devolves on the defendants."

NOTE. — See *Carney v. Rease*, 60 W.Va. 676, in which case the doctrine laid down in the principal case is approved.

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### BRYANT v. WARDELL.

2 Exch. 479. 1848.

TROVER for theatrical dresses and other property. It appeared that certain chattels had been bailed to the defendants, who, during

the term, used them for a purpose not authorized by the bailment.

POLLOCK, C.B. We are clearly of opinion that trover is the proper form of action here, notwithstanding the continuance of the contract under which the goods had been bailed to the defendants. The case of *Cooper v. Willomatt*, 1 C. B. 672, is a decisive authority upon this point. It was there held, that a bailee of goods for hire, by selling them, determines the bailment; and the bailor may maintain trover against the purchaser, though the purchase was *bona fide*. The cases on the subject are referred to there. The rule is, that where there has been a misuser of the thing lent, as by its destruction, or otherwise, there is an end of the bailment, and the action for trover is maintainable for the conversion.

### LORD PETRE v. HENEAGE.

12 Mod. 519. 1699.

TROVER by the plaintiff, as administrator *cum testamento annexo* of the late Lord Petre against the wife of the first executrix, for a necklace of pearl.

HOLT, C.J. The wearing of a pearl is a conversion.

NOTE. — *West Jersey Railroad Co. v. Trenton Car Works Co.*, 32 N.J.L. 517. The defendants received a car which was the property of the plaintiff. They should have forwarded it as freight. "Instead of doing so, they filled it with their own passengers. This was a conversion, at the option of the plaintiffs. They continued to use it for a couple of weeks afterwards, by agreement with Dungan [who was not authorized by the plaintiff to make such agreement]. This was a conversion."

Cf. *Fifield v. Maine Central Railroad Co.*, 62 Me. 77, 82. A bailee who uses the chattel after the bailor's title has been transferred, but before he has notice of the transfer, is not a converter.

*holding for conversion for passengers  
have notice of transfer.*

### FROME v. DENNIS.

45 N. J. L. 515. 1883.

DIXON, J. In August, 1879, the plaintiff left his plow on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plow still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow of Hibler



to plow a field, supposing the plow to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use and the return of the plow or its value, and the defendant not complying, the plaintiff brought an action of trover for the plow. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plow. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

The conduct of the defendant in the case at bar did not amount to a conversion of the plow. He received it for a temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plow to the plaintiff on demand was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not *refuse* to deliver, but could not. *Ross v. Johnson*, 5 Burr. 2825; *Salt Springs Bank v. Wheeler*, 48 N.Y. 492; *Magnin v. Dinsmore*, 70 N.Y. 410.

## SECTION 6.

## POSSESSING THE CHATTEL UNDER A CLAIM OF RIGHT.

## HURST v. GWENNAP.

2 Starkie, 306. 1817.

THIS was an action of trover, brought by the plaintiffs as the assignees of Foster, a bankrupt, to recover the value of certain books.

~~Foster was a bookseller, and on the 14th of June the defendant called at his shop and purchased two books of the value of 35*l.* and 25*l.*, on sale and return. An act of bankruptcy had then been committed, but it did not appear that the defendant had any knowledge of the bankruptcy. Four days after the sale a commission of bankruptcy was sued out against Foster.~~

Lord ELLENBOROUGH was of opinion that the action was maintainable, since the very act of taking the goods from one who had no right to dispose of them, was in itself a conversion.

*Verdict for the plaintiff.*

## HYDE v. NOBLE.

13 N.H. 494. 1843.

TROVER, for certain boards, plank, and shingles, alleged to have been converted by the defendants, January 2, 1840.

It appeared in evidence, that in November, 1839, the plaintiff and certain other persons were the owners of a quantity of lumber, at Hallowell and Gardiner, in Maine. The lumber was manufactured at mills there, which were hired by the plaintiff, for the benefit of all the owners of the lumber, and the plaintiff had the possession of the mills and lumber, for himself, and as agent for the other owners, and had the complete control of it.

In that month the plaintiff contracted with William S. Kenniston, master of the schooner *Prospect*, to take a cargo of the lumber from Hallowell and Gardiner to Weymouth, in Massachusetts, and caused the same to be put on board the vessel.

The vessel lay some days at the mouth of the Kennebeck River; and having encountered a severe storm on her passage, which caused her to leak badly, put into the harbor of Portsmouth, during the storm, on the 15th of December.

It was necessary to take out some of the lumber, in order to lighten the vessel, but no repairs were made except on one of the sails, and these were made from materials on board.

While the vessel lay at Portsmouth, the defendants, who are partners, purchased some of the lumber of Kenniston.

PARKER, C.J. The plaintiff had a sufficient property in the lumber to enable him to maintain trover, if the defendants are liable. He was part owner of the lumber, and although others were interested in it, yet it appears that he hired the mills at which it was manufactured, had possession of them and of the lumber, and had the complete control of it. It is evident that he might have sold it, being accountable to those interested for the proceeds, and it seems that he had shipped it for that purpose. He had, then, a general property in part, and a special property in the residue, and the latter alone is sufficient for the purpose of this action. 2 N.H. Rep. 320, *Jones v. Sinclair*; 4 Bing. 489, *Knight v. Legh*. The sale by Kenniston terminated the bailment, and the plaintiff had the right of possession. 6 N.H. Rep. 14, *Sanborn v. Colman*; 8 N.H. Rep. 325, *Sargent v. Gile*.

The purchase by the defendants, taking possession as they appear to have done, and holding it as their own property, was a conversion. They received the possession from one who had no authority to deliver it to them, under a sale which purported to vest the property in them; and they, by the purchase, undertook to control it as their own property. This was an assumption of power over it, inconsistent with the rights of the plaintiff. Purchasing the property from one who had no right to sell, and holding it to their own use, is a direct act of conversion, without any demand and refusal. Their possession was unlawful in its inception, by reason of the want of authority in Kenniston to make the transfer. It is only where a party obtains the possession lawfully, that it is necessary to show a demand and refusal.

NOTE. — See, *accord*, *McNeill v. Arnold*, 17 Ark. 154, 174; *Robinson v. McDonald*, 2 Ga. 116; *Chandler v. Ferguson*, 2 Bush (Ky.) 163; *Freeman v. Underwood*, 66 Me. 229; *Harker v. Dement*, 9 Gill (Md.) 7, 16; *Riley v. Boston Water Power Company*, 11 Cush. (Mass.) 11; *Sunlin v. Skutt*, 133 Mich. 208; *Heberling v. Jaggard*, 47 Minn. 70; *Johnson v. White*, 21 Miss. 584; *Surles v. Sweeney*, 11 Oreg. 21; *Carey v. Bright*, 58 Pa. 70, 83; *Courtis v. Cane*, 32 Vt. 232; *Eldred v. Oconto Co.*, 33 Wis. 133, 140.

See, *contra*, *Gillet v. Roberts*, 57 N.Y. 28, in which the court said (p. 30): "It is well settled that a *bona fide* purchaser of personal property at a sheriff's sale, or even from a wrong-doer, is not liable for a conversion without a demand and refusal"; *Parker v. Middlebrook*, 24 Conn. 207, 210; *Wood v. Cohen*, 6 Ind. 455; *Burckhalter v. Mitchell*, 27 S.C. 240, 243.

In *Dean v. Cushman*, 95 Me. 454, the court said (p. 457): "We hold

that one who purchases in good faith, without actual notice, mortgaged chattels of the mortgagor in possession, if he has merely received the goods into his own possession, and has exercised no other dominion or control over them to the exclusion of the mortgagee or in defiance of his rights, is not liable for a conversion, without demand or refusal."

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ADAMS v. MIZELL.

11 Ga. 106. 1852.

By THE COURT. — NISBET, J., delivering the opinion.

According to the evidence, the defendant received the negroes as a loan for an indefinite term. After his marriage with the mother of the plaintiffs, the woman, Rose, was sent home with him by his father-in-law, under whose will the plaintiffs claim, "to be well treated until he called for her," he saying farther, "that he would not give her to them to spend, but to keep until he called for her." The evidence farther is, that the defendant had been in possession of Rose and her descendants ever since; always claimed them as his own, and worked and treated them as owners of slaves usually do. It is farther in evidence, that one of the witnesses had a conversation with the defendant before this suit was instituted, about a threatened suit by one of the plaintiffs, in which defendant stated, that "he knew that Allen Dorman had given the negroes to his (defendant's) children in his will, but that they were his, and he should hold them in spite of them." Upon this evidence, the court non-suited the plaintiffs, because there was no proof of conversion, and they have excepted. The user and control of the slaves alone do not amount to conversion, because consistent with the lender's title, according to the right of possession, which the defendant acquired by the loan. There was nothing in them tortious. But the assertion of a title to the property, made after the death of the lender, with knowledge of the plaintiffs' title, and made in direct reference to their title, and a declaration that he would hold it, in spite of them, in addition to the use and control, is proof of conversion. The defendant negatived both the right of property and right of possession of the plaintiffs; repudiated the character in which he acquired the possession, and appropriated the property. These things constitute conversion, and the evidence proves them. The case, in our opinion, ought to have gone to the jury. *Liptrot v. Holmes*, 1 Kelly, 391, '2.

*Let the judgment be reversed.*

## HUDDLESTON'S ADMR. v. CURRIN.

4 Humph. (Tenn.) 237. 1843.

THIS action of trover was brought in the Circuit Court of Williamson, by Huddleston, a constable, against Currin, a trustee. Huddleston, a constable, levied on a horse, the property of one Bateman, by *fi. fa.* and the horse was sent off to Williamson County, and was there levied on by *fi. fa.* at the instance of other creditors of Bateman, sold, and purchased by Charter. Charter conveyed the horse by deed of trust to Currin, as trustee for the benefit of his creditors. This deed recited that he "bargained, sold and delivered" the horse to Currin in trust for the benefit of his creditors. It authorized the trustee to sell the horse after the expiration of twelve months, if the debts were not paid, but was silent as to the possession in the meantime. The horse, by verbal agreement of the parties, did not go into the possession of Currin, but remained with Charter. Huddleston demanded a surrender of the title of the horse of Currin, which Currin refused. The case was submitted on plea of not guilty, to a jury, MANEY, Judge, presiding.

He charged the jury, that a constable by levy acquired a right to personal property which would authorize an action; that the deed from Charter to Currin was not such as necessarily made Currin liable to this action of the plaintiff; that the possession of the goods by Charter for twelve months previous to the day on which Currin was authorized to sell was quite as consistent with the deed as the possession of Currin; and that if it was understood between them that Charter should retain possession for the twelve months, and he did retain the possession, the bare refusal of Currin within that time to relinquish his claim to the property under the deed of trust, would not be a conversion upon which the action of trover could be sustained.

The jury rendered a verdict in favor of the defendant, from which the plaintiff's administrator (the plaintiff having died and the suit being renewed by his administrator) appealed.

REESE, J., delivered the opinion of the court.

This is an action of trover to recover the value of a horse, alleged to have been converted by defendant. The horse was not, and had never been in the actual possession of defendant: he was included among other property in a deed of trust, made by one Charter to defendant as trustee, to secure the debts of third persons, and the trustee was empowered, after the lapse of twelve months, to sell the property. This suit was brought within the twelve months; and the only evidence of conversion is, that Currin being asked by plaintiff if the horse was in the deed of trust, said he did not know; and being inquired of, whether, if so included, he would not surrender all claim to the horse, he replied that he would not. The court charged the

jury, that during the twelve months previous to the time limited in the deed of trust for the sale of the property, the possession of Charter was consistent with the title of Currin; and if by the understanding of the parties, the property during the twelve months was to remain in the possession of Charter, and did so remain, then the mere refusal of Currin, the trustee, to surrender his claim by virtue of the deed of trust, would not amount to an act of conversion in him.

We are unable to perceive any error in this charge of the court. If the deed of trust be silent on the subject of possession — if the trustee has no present power to sell, and if the understanding or agreement were that the grantor should retain possession of the property till the sale — the trustee does no wrongful act, is guilty of no conversion, when he simply refuses to relinquish the title to the property.

*Let the judgment be affirmed.*

NOTE. — *Forth v. Pursley*, 82 Ill. 152. Purchasing property at a tax sale, but not taking possession, is not a conversion of such property.

*Burnside v. Twitchell*, 43 N.H. 390. Taking, and foreclosing, a mortgage on property, without taking possession thereof, is not a conversion of such property.

*Irish v. Cloyes*, 8 Vt. 30. The mere assertion of ownership of property, without more, is not a conversion of such property.

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### SPACKMAN v. FOSTER.

L. R. 11 Q. B. D. 99. 1883.

THIS was an action tried at the Cambridge Assizes on the 1st of February, 1883, to recover certain title deeds.

At the trial it appeared that the plaintiffs were jointly entitled to certain land at Cottenham, in the county of Cambridge, the title deeds of which were in their possession up to October, 1859. At that date John Spackman, a son of one of the plaintiffs, deposited the deeds without their knowledge with the defendant to secure an advance of 100*l*.

John Spackman died in 1874, having up to that time paid the interest on the mortgage money, which was paid after his death by his widow. The plaintiffs were not aware that the title deeds had been taken from them until April, 1882, when, on the land being advertised for sale, the defendant gave notice that he held the title deeds and claimed to hold them as security. The plaintiffs thereupon demanded them, and, on the refusal of the defendant to give them up, this action was brought. The defendant pleaded the Statute of Limi-

tations, but the learned judge at the trial ruled that the deposit by John Spackman in 1859 gave no title to the defendant against the plaintiffs, and that the Statute of Limitations did not then begin to run and afforded no defence to the action. A verdict was accordingly directed for the plaintiffs. A rule *nisi* for a new trial was subsequently obtained on the ground of misdirection.

GROVE, J. This was an action brought by the two plaintiffs, who were owners of certain real property, to recover possession of their title deeds. It appears that for a long time they had no occasion to refer to the title deeds, but that when inquiry was made for them they were found to be in the possession of the defendant, of whom they were demanded, but who refused to give them up. An action was commenced to which the defendant pleaded the Statute of Limitations. The judge at the trial decided in favour of the plaintiffs that the statute had not run against them, but that they were entitled to the deeds, and they accordingly obtained judgment. Afterwards a rule to set aside that judgment was obtained on the ground that the claim was barred by the statute. Several points were raised in argument, but the only one material to our decision is whether the plaintiffs could have brought an action for the detention of the deeds without previously having demanded them. The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as deposit<sup>ee</sup> or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion. The case most relied on for the defendant was *McCombie v. Davies*, 6 East, 538. The headnote of that case certainly appears to support the defendant's argument, but there is the great distinction that there was a demand and refusal. Lord ELLENBOROUGH says that assuming to oneself the property and right of disposing of another man's goods is a conversion, but that was not the case here, for all that the defendant assumed was the right of safe keeping against the person depositing till the amount advanced should be repaid, but he did not in any other respect assume to himself the right of disposing of another man's goods which Lord ELLENBOROUGH said would amount to conversion. The other judges assented, but the ground of their opinion is added, "that when the defendant was afterwards informed of the plaintiff's rights and the tobacco was demanded of him he refused to deliver it." On the whole, I think that there was

no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds. Consequently the ruling of the learned judge at the trial was right, and this rule must be discharged.

STEPHEN and DAY, JJ., concurred.

*Rule discharged.*

NOTE. — See, *accord*, *Union Bank v. Mersey Docks*, [1899] 2 Q. B. 205, 216; *Leonard v. Tidd*, 3 Met. (Mass.) 6, *supra*; *Leuthold v. Fairchild*, 35 Minn. 99.

See, *contra*, *McCombie v. Davies*, 6 East, 538; *Hotchkiss v. Hunt*, 49 Me. 213, 224. Taking possession of a chattel by virtue of a mortgage thereon was held to be a conversion in *Stanley v. Gaylord*, 1 Cush. (Mass.) 536.



## CHAPTER II.

RIGHT OF A BAILOR TO SUE FOR A CONVERSION  
BY A STRANGER.

## GORDON v. HARPER.

7 T. R. 9. 1796.

IN trover for certain goods, being household furniture, a verdict was found for the plaintiff, subject to the opinion of this court on the following case:— On 1st October, 1795, and from thence until the seizing of the goods by the defendant, as after mentioned, Mr. Biscoe was in possession of a mansion-house at Shoreham and of the goods in question, being the furniture of the said house, as tenant of the house and furniture to the plaintiff, under an agreement made between the plaintiff and Mr. Biscoe, for a term which at the trial of this action was not expired. The goods in question were on the 24th of October taken in execution by the defendant, then sheriff of the county of Kent, by virtue of a writ of *testatum fieri facias* issued on a judgment at the suit of J. Broomhead and others, executors of J. Broomhead, deceased, against one Borrett, to whom the goods in question had belonged, but which goods, previous to the agreement between the plaintiff and Mr. Biscoe, had been sold by Borrett to the plaintiff. The defendant after the seizure sold the goods. The question is, whether the plaintiff is entitled to recover in an action of trover.

Lord KENYON, Ch.J. The only point for the consideration of the court in the case of *Ward v. Macauley* was, whether in a case like the present the landlord could maintain an action of trespass against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extrajudicial opinion, to which upon further consideration I cannot subscribe. The true question is, whether when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, and has only a reversionary interest, he can notwithstanding recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household

goods, the goods here taken had been machines used in manufacture which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term: the difference of the goods then cannot vary the law. The cases which have been put at the bar do not apply: the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said, that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and by the very act of felling it his right is absolutely determined; and even then the property does not vest in his immediate landlord; for if he has only an estate for life, it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term cannot be divested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon so to do: but it is clear that he cannot maintain trover.

NOTE. — See, *accord*, *Bacon v. George*, 206 Mass. 566, 570..

The bailee may have participated in the wrongful act, and thereby forfeited his bailment. Then the owner may sue the stranger as well as the bailee. See *Mulliner v. Florence*, L. R. 3 Q. B. D. 484, *supra*; and *McCombie v. Davies*, 7 East, 5, *supra*.

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### MANDERS v. WILLIAMS.

4 Exch. 339. 1849.

TROVER for certain porter casks. — Pleas, not guilty and not possessed; upon which issues were joined.

At the trial, before ERLE, J., at the Carmarthen Spring Assizes, 1849, it appeared that the plaintiffs, who were porter merchants in Dublin, were accustomed to supply one John David, of Laugharne in Wales, with porter. The course of dealing was to consign the porter to David twice a year in half-barrel casks, with an invoice, charging nothing for the casks, which were returned by him to the plaintiffs when empty. In April, 1848, the plaintiffs sent to David a quantity of porter, with a bill of lading in the usual form, and the following invoice, dated the 13th of April, 1848: —

“Invoice of butts, hhds., brls., 440 half-brls. porter (Irish measure) shipped by order and for account, risk, and to address of John David, Laugharne. The empty casks to be returned

to Dublin at his expense and risk within six months from date hereof, or paid for at invoice price, at the option of the shippers."

The invoice then stated the price of the porter; and there was this note at the foot: — "Value of the barrels 7s. 6d. each."

In June, 1848, the plaintiffs consigned sixty more half-barrels of porter to David, with a similar invoice, dated the 24th of June. In August, 1848, the defendant, who was sheriff of Carmarthenshire, seized and sold, under a *fiery facias* against David, 300 of these casks, which were lying empty in his cellar. The present action was commenced on the 26th of the following October, and more than six months after the date of the first invoice, but less than six months after the date of the second. The learned judge was of opinion that under this contract the plaintiffs had not a sufficient possession to maintain trover, and he directed a verdict for the defendant on the plea of not possessed, reserving leave for the plaintiffs to move to enter a verdict for them for 112*l.* 10*s.*, being the value of the 300 casks at 7*s.* 6*d.* each, if the court should be of opinion that they had sufficient possession to enable them to maintain the action.

PARKE, B. I am of opinion that the rule ought to be absolute. *Gordon v. Harper*, which must now be considered as settled law, shews, that if a person has an interest in goods for a certain time, by agreement with the owner, the latter, during the time that he is not in possession, cannot maintain trover against a wrongdoer who takes the goods. That case might, with propriety, have been differently decided in the first instance; but it has been followed by others, and the Court of Common Pleas somewhat extended the rule in *Bradley v. Copley*. There it was held, that, where a person in possession of goods had an uncertain interest determinable by the owner, until that event happened, the owner could not maintain trover, although, according to a passage in Sheppard's Touchstone, p. 272, a contract of that description with respect to real estate would not prevent the owner from recovering in ejectment. The question is, in what condition was David under this contract; had he a certain interest at the time of the sale, or an uncertain interest determinable at the option of the plaintiffs, so as to bring the case within the principle of *Bradley v. Copley*? That depends upon the terms of the invoice, which gave him *some* right to the casks. The contract must be construed with reference to the course of trading between the parties — the vendor in Dublin selling porter to a person in Wales. The object was, to put the vendee in possession of the porter, and he was to have the casks for keeping the porter, until he had an opportunity of disposing of it. Then what was his situation as soon as the porter was emptied from the casks? Was he more than a mere bailee during pleasure, the plaintiffs having a right to say, "You have no longer any claim to the possession of the casks: that was determined when they were emptied, and we insist upon their being delivered to us"?

That being so, the plaintiffs are entitled to maintain trover against a stranger who seizes the casks, and the sheriff is in that position. The true construction of the contract is to give David an interest only until the casks were empty. I agree with Mr. Davison, that in this contract every stipulation is for the benefit of the vendors, not the vendee. The latter is to incur all risk; he is under the obligation of sending the empty casks to Dublin at his own expense, and before the end of six months from the date of the contract; if not, there is an option for the benefit of the vendors, of calling on him to purchase the casks at a fixed price. Those stipulations shew, that the interest of the vendee was never meant to extend beyond the right to keep the casks until the porter was consumed. Possibly, he might within the six months have transferred the porter in the casks to a sub-vendee, but, as soon as the casks were emptied, the right to them reverted to the vendors. According to the true construction of this contract, I am satisfied that it was never intended that David should have the casks for any other purpose than keeping the porter. Indeed, I do not see what advantage there could be in his right of possession continuing after the casks were empty; for, during the residue of the six months, he could neither let them to any one else nor make any further use of them himself, without being a wrongdoer, and at the end of the six months he was bound to return them. So soon as the casks were empty, the right of property and the right of possession reverted to the plaintiffs, and David was in the situation of a mere bailee during pleasure. No proposition can be more clear, than that either the bailor or the bailee of a chattel may maintain an action in respect of it against a wrongdoer; the latter by virtue of his possession, the former by reason of his property. This is laid down in 2 Roll. Abr., p. 551, pl. 22, 30, Com. dig. "Trespass" (B. 4), and in other authorities. The verdict must therefore be entered for the plaintiffs for the price of the casks.

ALDERSON, B., and PLATT, B., concurred.

*Rule absolute.*

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AMES v. PALMER.

42 Me. 197. 1856.

THIS was an action of trover for a cask and twenty gallons of rum, taken from on board a vessel. Plea, general issue and a justification.

The defendants, to justify the taking, offered a complaint made by said Palmer, defendant, and others, and a warrant and judgment of Woodbury Davis, a justice of the peace, which were objected to.

Defendants contended that plaintiff was bound to show that the freight on the property from Boston, due to the owners of schooner

Comet, which brought it, had been paid, and the lien on it discharged.

Plaintiff asked the court to instruct the jury that "where goods are wrongfully taken from a bailee, that it is not necessary, in order for the owner to maintain trover for their value against the wrongdoer, that said owner should tender or pay to the bailee any freight for which said bailee might have a lien on the goods; nor could such wrongdoer set up any such lien except under the express authority of such bailee.

"2d. That no proof of ownership being made, the burden of proof would be on him, who asserted the existence of any unsatisfied lien, to prove it affirmatively."

The court instructed the jury that it was incumbent upon the plaintiff to satisfy them by proof that the plaintiff had both the property, and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained.

The jury found for the defendants; and, being inquired of, stated, that they found for defendants on the ground that the freight had not been paid, and the claim of the carrier had not been waived.

MAY, J. In this case the jury were instructed that it was incumbent on the plaintiff to satisfy them, by proof, that he had a right of property in the goods sued for, and the right of immediate possession; and that, if they were satisfied from the evidence in the case, that the carrier had a lien for the freight, which had not been paid or waived, then the action could not be maintained. Upon the rendition of the verdict, the jury being inquired of by the court, stated that they found for the defendants, upon the ground that the freight had not been paid and the claim of the carrier had not been waived.

That a common carrier has a lien upon the goods transported by him, and a right to retain the possession, as against the general owner, until his reasonable charges are paid; and that the plaintiff, in an action of trover, cannot recover without proof of property in himself, and the right of immediate possession, is not questioned by the learned counsel for plaintiff. Such is the law.

It is, however, contended that the right to retain possession of the goods transported, which, by the common law, attaches to a common carrier, to enforce the payment of his charges, is of such a nature that it does not deprive the general owner of the right to immediate possession, as against a wrongdoer; and constitutes no bar to the possession of the property, unless set up by the authority of the party holding such lien. Upon examination of the authorities we are of opinion that these positions are well maintained.

It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not trans-

ferable, and that no question upon it can arise except between the principal and factor. *Daubigny et al. v. Duval et al.*, 5 D. & E. 604; *McCombie v. Davies*, 7 East, 5; *Jones v. Sinclair*, 2 N.H. 319; *Holly v. Huggeford*, 8 Pick. 73. In this State the same principle has been adopted in relation to a statute lien. *Pearsons v. Tinker*, 36 Maine, 384.

In the case of *Holly v. Huggeford*, just cited, it was argued in defence, that the lien of the factor *so destroyed* the right of possession in the general owner, that he could not maintain an action of trespass against an officer who had attached the goods as the property of the factor, but the court decided that such a position was untenable; and PARKER, C.J., says, that "the lien of a factor does not dispossess the owner until the right is exerted by the factor. It is a privilege which he may avail himself of, or not, as he pleases. It continues only while the factor himself has the possession; and, therefore, if he pledges the goods for his own debt, or suffers them to be attached, or otherwise parts with them voluntarily, the lien is lost, and the owner may trace and recover them, *or he may sue in trespass if they are forcibly taken*; for his constructive possession continued notwithstanding the lien."

No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common law liens; and such a lien has very properly been defined to be the right of detaining the property, on which it operates, until the claims which are the basis of the lien are satisfied. *Hammond v. Barclay*, 2 East, 235; *Oakes v. Moore et al.*, 24 Maine, 214. The object of these liens being the same, their effect must be the same. *Ubi eadem ratio ibi idem jus*. The lien, therefore, of a common carrier, does not deprive the owner of the goods of his right to immediate possession, as against a tortfeasor. The judge presiding at the trial, therefore, erred in instructing the jury, that if they were satisfied that the carrier had a lien for the freight, which had not been paid or waived, the plaintiff could not recover.

*Exceptions sustained and new trial granted.*

## CHAPTER III.

RIGHT OF THE CONVERTER TO RETURN THE  
CHATTEL IN MITIGATION OF DAMAGES.

## FISHER v. PRINCE.

3 Burr. 1363. 1762.

UPON shewing cause by the plaintiff's counsel, "Why, upon delivering to the plaintiff the several goods and chattels for which this action (which was an action of trover) was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed;" (which rule to shew cause had been obtained upon a motion made by the counsel for the defendant;) it was urged on the part of the plaintiff, that this is, in effect, a motion "To bring the goods into court;" and it was contrary to the course of the court, in actions of trover, to bring into court the thing demanded; (excepting the single case of trover for monies numbered;) and that the reason which has been often given for it is, "That this court do not keep a warehouse:" and a case was hinted at, where a motion to bring in a gold watch was denied.

And the court denied it in the present case, and discharged the rule: but it was not upon that general principle that they denied it, but upon the circumstances of the case; such as the complicated quantity of the goods demanded, and the uncertainty of their remaining of the same value as they were when taken; and some other like circumstances. For

Lord MANSFIELD and Mr. Justice WILMOT both concurred in the following distinction, "That where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of the damages, there the specific thing demanded may be brought into court; (and Mr. Justice WILMOT said, this was the more reasonable, as this action of trover comes in the place of the old action of detinue:) where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it that may enhance the damages above the real value of the thing, and there is no rule whereby to estimate the additional value, there it shall not be brought in." Lord MANSFIELD said,

it is pity that a false conceit should, in judicature, be repeated as an argument: "The court does not keep a warehouse." What then? What has a warehouse to do with ordering the thing to be delivered to the plaintiff? Money paid into court is payment to the plaintiff. The reason and spirit of cases make law; not the letter of particular precedents. In trover for money numbered, or in a bagg, the court have ordered it to be brought in: yet the jury may give more in damages; they may allow interest, (and in some cases they ought.)

The reason holds to every other case, where a thing clearly remains of the same value: yet the jury may give damages for the detention.

I remember its being done twice or thrice, in things of small value. It ought to be done, to prevent vexatious litigation; which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the specific relief.

It ought to be done; because at the trial, when the thing remains in the same condition, there generally is a rule "To deliver it."

An estimated value is a precarious measure of justice, compared with the specific thing.

I am aware of the cases where a laced head, a gold watch, a diamond ring, and Chinese pictures were refused to be brought in.

But, as I think, "Such motions ought neither to be refused or granted, of course," they must depend upon their own circumstances. No injury is done the plaintiff, if the court should think "He ought not to proceed for damages beyond the specific thing;" because he may still proceed for more, at the peril of costs: and so he ought.

But, in this particular case, the goods are altered, and their value changed.

NOTE. — In the Cases on Torts (3rd edition, p. 390), edited by the late Dean Ames, there was printed the following learned note which, by the courtesy of the members of his family, is here reproduced: —

"On principle, and by the earlier English decisions, an unaccepted tender of the converted goods was no ground for reducing the amount of the plaintiff's recovery for the conversion. *Wilcock's Case*, 2 Salk. 597; *Bowington v. Parry*, 2 Stra. 822; *Watkinson v. Cockshot*, Cooke, Pr. Cas. 130. An opposite practice seems to have begun in 1731, *Tuney v. Clark*, Cooke, Pr. Cas. 59; 1733, *Billings v. Wilcocks*, Cooke, Pr. Cas. 59; 1739, *Cooke v. Holgate*, Pr. Reg. 260; Barnes, Notes, 281; Cooke, Pr. Cas. 130, s. c.

"But these cases were disregarded, and the old common law rule followed in *Olivant v. Berino*, 1 Wils. 23, 2 Stra. 1191, s. c.; *Harding v. Wilkin*, Sayer, 120 (explaining *Catling v. Bowling*, Say. 80).

"These cases were in turn overruled in 1762 by *Fisher v. Prince*, 3 Burr. 1363, where Lord MANSFIELD and Mr. Justice WILMOT laid down the rule that, 'where trover is brought for a specific chattel, of



an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value; . . . there the specific thing demanded may be brought into court (and Mr. Justice WILMOT said this was the more reasonable, as this action of trover comes in the place of the old action of detinue).’ Lord MANSFIELD’s rule has since prevailed in England.”

The English practice was approved in *Rutland Co. v. Bank of Middlebury*, 32 Vt. 639 (but cf. *Green v. Sperry*, 16 Vt. 390; *Morgan v. Kidder*, 55 Vt. 367); and in *Bigelow Co. v. Heintze*, 53 N. J. L. 69, the court held that in view of defendant’s renunciation of any claim to the property, the defendant was entitled to nominal damages only (but cf. *Woolley v. Carter*, 2 Halst. (N. J. L.) 85). See also the dictum of the court in *Gilbert v. Peck*, 43 Mo. App. 577, 583.

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### CARPENTER v. DRESSER.

72 Me. 377. 1881.

On exceptions from Superior Court, Cumberland.

Trespass against the sheriff for the act of his deputy in attaching certain oil paintings, frames, silver plated ware, and other articles, on a writ against Morgan and Davenport, who were at the time auctioneers employed by the plaintiff to sell the goods at auction.

PETERS, J. A deputy sheriff wrongfully attached the plaintiff’s goods, dispossessing the plaintiff and putting a keeper in charge of his store. On the next day, the deputy tendered to the plaintiff a return of the goods uninjured, and in the same condition as when attached the day before. The plaintiff refused to receive them.

It was ruled, at the trial, that the damages for the attachment and taking should be limited to any injury necessarily sustained by the plaintiff, by the disturbance of his possession from the date of the attachment to the date of the offered return. This was error. The general rule of damages applies in such case. The plaintiff was entitled to recover what the entire property was worth when it was attached. A return of property in mitigation of damages could not be forced upon the owner against his consent.

When repossession and redelivery are spoken of, in the cases relied upon by the defendant, as going in mitigation of damages, it has reference to a return of the property with the consent of the owner. A person cannot be said to possess, who does not consent to the possession. Nor can there be a redelivery where there is no acceptance. A mere offer to deliver is not a delivery.

It has been held that an officer, liable as a trespasser for irregularly distraining goods for taxes, may be entitled to have the amount of the taxes deducted from the damages recoverable against him, the

taxes being regarded as thus cancelled and paid. It is for the owner's benefit in such case that the tax be regarded as paid. And other cases founded upon the same or a similar principle may be found. But in all of them the doctrine is founded upon the idea, that the deduction or mitigation is allowed with the implied assent of the owner. The case at bar is not such a case.

The case most relied upon, to support the proposition advocated by the defendant, is *Delano v. Curtis*, 7 Allen, 470. But in that case a vital element was wanting which is not absent here. In that case, the defendant did not take the property into his own possession, or necessarily exclude the owner from its control. He merely forbade, but did not attempt to prevent, a removal of property which was upon his own premises. The facts are not very fully reported, but *Greenfield Bank v. Leavitt*, 17 Pick. 1, is cited in the opinion as its authority, and the latter case decides only, that "if the property for which the action is brought, should be returned to and received by the plaintiff, it shall go in mitigation of damages." In *Stickney v. Allen*, 10 Gray, 352, the same court refused to apply the doctrine, which the present defendant contends for, to a state of facts calling for its application, if in any case it should be applied, the property taken being certain stereotype plates of peculiar value to the plaintiff, and of very little value to anybody else. But, as PUTNAM, J., said, in *Greenfield Bank v. Leavitt*, *supra*, "the certainty of a rule is quite an equivalent for its occasional want of perfect exactness."

The rule asked for by the defendant would give to the trespasser more power and discretion than courts are accustomed to exercise which order an acceptance of property offered to be returned in mitigation of damages, after a hearing as to its justice and expediency. In such case, by the power of the courts, an owner may have to accept a return of his property; but by the power of the party he must accept it, if the defendant's theory prevails.

It is true, that such a rule would work well in a few peculiar and exceptional cases. The trouble is, that it would operate unjustly in very many and most cases. A dividing line could not be easily established. The rule would have to apply to all cases where the trespass is not wilful, wanton or malicious. This would give the election to the trespasser to decide how an owner shall be compensated for his trespasses. It would have a tendency to stimulate carelessness and unwarranted experiments in attaching property. It would impose unusual and unreasonable risks and responsibilities upon the owner. He may lose his credit, or be broken up in his business, by an improvident trespasser, and still be obliged to accept his goods again. He may, in the meantime, have got other goods, or gone into other business, and not be favorably situated to take the property back. He must at his peril decide correctly whether the trespass was a wanton or malicious act or not. How is he to ascertain that fact?

How may he know whether the property will be returned or not? How long shall he be held in suspense by the wrongdoer? How can he always know whether the property is returned in the same condition as when taken or not? In most cases, his embarrassments would be greater than he could bear. The law does not impose them upon him.

*Exceptions sustained.*

NOTE. — See, *accord*, *Norman v. Rogers*, 29 Ark. 365, 369; *Gibbs v. Chase*, 10 Mass. 125, 128; *Stickney v. Allen*, 10 Gray 352 (but cf. *Delano v. Curtis*, 7 All. 470); *Bringard v. Stellwagen*, 41 Mich. 54, 57; *Livermore v. Northrup*, 44 N.Y. 107, 112; *Railroad Co. v. O'Donnell*, 49 Ohio, 489, 503; *Whitaker v. Houghton*, 86 Pa. 48; *Weaver v. Ashcroft*, 50 Tex. 427, 444.

BOOK V.  
INTRODUCTION TO THE LAW OF  
CONVEYANCING.

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CHAPTER I.  
TENURE.

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BLACKSTONE, COMMENTARIES.

Book II, pp. 45, 51, 59.

THE constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who, all migrating from the same *officina gentium*, as Crag very justly entitles it, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern language signifies a conditional stipend or reward. Rewards or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty: and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.

. . . In consequence of this [introduction of the feudal system into England] it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures "that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him,

to be held upon feodal services." . . . Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king, and, thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A., and he granted a portion of the land to B., now B. was said to hold of A., and A. of the king; or, in other words, B. held his lands immediately of A., but mediately of the king. The king therefore was styled lord paramount; A. was both tenant and lord, or was a *mesne lord*: and B. was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit of the land. In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for, according to Sir Edward Coke, in the law of England we have not properly *allodium*; which, we have seen, is the name by which the feudists abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feodal nature.

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honourable species of tenure, but at the same time subjected the tenants to greater and more burthensome services, than inferior tenures did. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

I. There seems to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the nature of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier or a freeman to perform; as to serve under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were only fit for peasants or persons of a servile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence; as, to pay a stated annual rent, or to plough such a field for three days. The *uncertain* depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

From the various combinations of these services have arisen the

four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern; of which the following is the outline or abstract. "Tenements are of two kinds, *frank-tenement* and *villanage*. And, of frank-tenements, some are held freely in consideration of homage and *knight-service*; others in *free-socage* with the service of fealty only." And again, "of villanages some are pure, and others privileged. He that holds in *pure villanage* shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villanage is called *villein-socage*; and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: first, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry, *per servitium militare*, or by knight-service. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, etc., that tenure was called *liberum socagium*, or free-socage. These were the only *free* holdings or tenements; the others were *villanous* or servile, as thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villanagium*, absolute or pure villanage. Lastly, where the service was *base* in its nature, but reduced to a *certainty*, this was still villanage, but distinguished from the other by the name of privileged villanage, *villanagium privilegiatum*; or it might be still called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium*, villein-socage.

NOTE. — The obligations of the tenants, under the different forms of tenure, will be found in Littleton, Tenures, §§ 85 *et seq.*

By St. 12 Car. II, c. 24 (1660), many burdens of tenure were abolished, and tenures not of free and common socage were, with some exceptions, converted into such tenure. The burdens of this tenure were small, — being practically reduced to an obligation to pay rent and a relief. A relief was a sum payable by an heir of full age, on succeeding to his ancestor's estate. This sum was one year's rent. It follows that, if land were held by a tenant in free and common socage, and that either no rent, or a merely nominal rent, were reserved, the tenant was, in practical effect, the absolute owner. Rents payable by a tenant in free and common socage are now redeemable. St. 44 and 45 Vict. c. 41, § 45 (1881).

After the passage of the St. 12 Car. II, c. 24, land could be held, and may in England still be held, not in socage, but (a) in frankalmoign, and (b) by copyhold. Littleton said (§§ 133, 135): "Tenant in frankalmoign is, where an abbot, or prior, or another man of religion, or of holy church, holdeth of his lord in frankalmoign; that is

to say in Latin, *in liberam eleemosinam*, that is, in free arms. . . . And they, which hold in frankalmoign, are bound of right before God to make orisons, prayers, masses, and other divine services, for the souls of their grantor or feoffor," etc. And in §§ 73, 75: "Tenant by copy of court roll, is, as if a man be seised of a manor, within which manor there is a custom which hath been used time out of mind of man, that certain tenants within the same manor have used to have lands and tenements, to hold to them and their heirs in fee simple, or fee tail, or for term of life, etc., at the will of the lord according to the custom of the same manor. . . . And these tenants are called tenants by copy of court roll; because they have no other evidence concerning their tenements, but only the copies of court rolls."

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#### BLACKSTONE, COMMENTARIES.

Book II, pp. 72, 89.

THE last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby every inheritable quality was entirely blotted out and abolished. In such cases the land escheated, or fell back, to the lord of the fee. . . .

Escheats are equally incident to tenure in socage, as they were to tenure by knight-service.

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#### STATUTE OF QUIA EMPTORES.

18 Edw. I, c. 1. 1290.

FORASMUCH as purchasers of lands and tenements of the fees of great men and other lords have many times heretofore entered into their fees, to the prejudice of the lords, to whom the freeholders of such great men have sold their lands and tenements to be holden in fee of their feoffors and not of the chief lords of the fees, whereby the same chief lords have many times lost their escheats, marriages, and wardships of lands and tenements belonging to their fees, which thing seems very hard and extreme unto those lords and other great men, and moreover in this case manifest disinheritance, our lord the king in his parliament at Westminster after Easter the eighteenth year of his reign, that is to wit in the quinzine of Saint John Baptist, at the instance of the great men of the realm granted, provided, and ordained, that from henceforth it should be lawful to every freeman to sell at his own pleasure his lands and tenements or part of them,

so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee, by such service and customs as his feoffor held before.

2. And if he sell any part of such lands or tenements to any, the feoffee shall immediately hold it of the chief lord, and shall be forthwith charged with the services for so much as pertaineth or ought to pertain to the said chief lord, for the same parcel, according to the quantity of the land or tenement so sold; and so in this case the same part of the service shall remain to the lord, to be taken by the hands of the feoffee, for the which he ought to be attendant and answerable to the same chief lord according to the quantity of the land or tenement sold for the parcel of the service so due.

3. And it is to be understood that by the said sales or purchases of lands or tenements, or any parcel of them, such lands or tenements shall in no wise come into mortmain, either in part or in whole, neither by policy nor craft, contrary to the form of the statute made thereupon of late. And it is to wit that this statute extendeth but only to lands holden in fee simple, and that it extendeth to the time coming. And it shall begin to take effect at the Feast of Saint Andrew the Apostle next coming.

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VAN RENSSELAER v. HAYS.

19 N.Y. 68. 1859.

DENIO, J. The law as to holding lands and of transmitting the title thereto from one subject to another must have been a matter of the first importance in our colonial state; and there can be no doubt but that the great body of the English law upon that subject, so far as it regarded the transactions of private individuals, immediately became the law of the Colony, subject to such changes as were introduced by colonial legislation. The lands were holden under grants from the Crown, and as the King was not within the statute *quia emptores*, a certain tenure, which, after the act of 12 Charles II (ch. 24) abolishing military tenures, must have been that of free and common socage, was created as between the King and his grantee. I have elsewhere expressed the opinion that the King might, notwithstanding the statute against subinfeudation, grant to his immediate tenant the right to alien his land to be holden of himself, and thus create a manor, where the land was not in tenure prior to the 18th Edward I. (*The People v. Van Rensselaer*, 5 Seld. 334.) But with the exception of the tenure arising upon royal grants, and such as might be created by the King's immediate grantees under express license from the Crown, I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Col-



only, and that it was the law of this State, as well before as after the passage of our act concerning tenures, in 1787. A contrary theory would lead to the most absurd conclusions. We should have to hold that the feudal system, during the whole colonial period, and for the first ten years of the State government, existed here in a condition of vigor which had been unknown in England for more than three centuries before the first settlement of this country. We should be obliged to resolve questions arising upon early conveyances, under which many titles are still held, by the law which prevailed in England during the first two centuries after the Conquest, before the commencement of the Year Books, and long before Littleton wrote his Treatise upon Tenures.

The fact that the statute we are considering was reënacted in this State in 1787, has no tendency to show that it had not the force of law prior to that time. Indeed, the contrary inference is nearly irresistible, when it is seen how it came to be reënacted. The compilation of statutes prepared by Jones and Varick, and enacted by the Legislature, embracing the statute of tenures and a great number of other English statutes, was made in pursuance of an act passed in 1786. It recited the constitutional provision which I have mentioned, and that such of the said statutes "as had been generally supposed to extend to the late Colony and to this State," were contained in a great number of volumes, and were conceived in a style and language improper to appear in the statute books of this State. The persons mentioned were, therefore, authorized to collect and reduce them into proper form, in order that such of them as were approved might be enacted into laws of this State, to the intent that thereafter none of the statutes of England or Great Britain should be in force here. (1 Jones & Var., ch. 35, 281.) The statute of tenures was not, therefore, understood as introducing a new law, but was the putting into a more suitable form certain enactments which it was conceived had the force of law in the Colony, and which the Constitution had made a part of the law of the State. My views upon this question correspond with those expressed by Mr. Justice PLATT, in 18 Johnson, 186. The English crown lawyers appear never to have doubted but that the statute was the law of the Colonies. Sir John Somers, Attorney-General, and afterwards Lord Keeper of the Great Seal in the reign of William III, and who is pronounced by Macaulay to have been, in some respects, the greatest man of his age, together with the Solicitor-General, Trevor, gave a written opinion to the King in council, that all the lands in Virginia were held immediately of the Crown, and that the escheats and tenure accrued to him and not to the grantors of the lands. The like opinion was given by Sir Edward Northey, Attorney-General to Queen Anne, in 1705, in respect to lands in New Jersey. He said that the grantees of the proprietors to whom the Duke of York had assigned his patent, held

of the Queen and not of these proprietors: and in another opinion, by the same law officer, respecting quit-rents in the Colony of New York, he states that no tenure arose upon grants by the Duke of York before he came to the Crown, he being a subject; but that where the grant was by the Crown there was a tenure, "the Crown not being within the statute of *quia emplores terrarum*." (Chalmer's Colonial Opinions, 142, 144, 149.)

These opinions assume that the statute prevailed here to the same extent as in England, and subject to the same exception in favor of royal grants, upon which a tenure always arises. Judge RUGGLES, in giving the opinion of the court in *De Peyster v. Michael*, 2 Seld. 467, was led to doubt whether the statute was ever in force in the Colonies, from finding that several patents, issued by the colonial governors, purported to create manors and to authorize the patentees to grant lands to be holden of the patentees. But if the King could, notwithstanding the statute, license his immediate tenants to create seigniories, as was attempted to be shown by one of the opinions in *The People v. Van Rensselaer*, and as I am satisfied is the case, these instruments are quite consistent with the idea that the statute was in force in the Colony of New York. Assuming this to have been so, our own law, in the particular under consideration, is and has at all times, since the organization of political society here, been the same as the law of England.

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### MATTHEWS v. WARD.

10 Gill & J. (Md.) 443. 1839.

ARCHER, J. The Lord Proprietary, by the express terms of the charter, held his lands in free and common socage, and his grantees, or tenants, anterior to the revolution, held by the same tenure. Services of a feudal character, or of the nature of feudal services, were attached to his grants, and the incidents of *fealty, rent, escheat and fines* for alienation or some of them, were the necessary incidents thereto. At the revolution, when the people of the State assumed the powers of government, and the right theretofore existing in the proprietary, these services and incidents were in effect abolished; thus the oath of allegiance to the State superseded the incident of fealty; quit rents were abolished, and grants were made without being subject to fine on the alienation of the grantee; and escheats, though they existed, had essentially changed their nature, no longer being technically founded on the same principles. Instead of going to the lord of the fee, who took the land in lieu of the services, because by the death of the tenant without his heirs there was no one to perform the feudal services; they reverted to the State as property without an

owner, upon a principle of justice, that the whole community should hold the derelict property for the benefit of all. After the revolution, therefore, lands became allodial, subject to no tenure, nor to any of the services incident thereto, and if allodial, the supreme power of the State would succeed to them as the king would succeed to allodial property in England, by the common law, upon the death of the owner without next of kin. It is said by Lord MANSFIELD, in 1 Wil. Black. 163-4, "In personal estates which are allodial by law, the king is last heir where no kin, and the king is as well entitled to that as to any other personal estate." And accordingly, where one dies intestate, without wife or kindred, Sir William Blackstone, 2 Black. Com. 505, says, that the usual course now is for some one to procure letters patent from the crown, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown. Thus the king as *parens patriæ* is entitled to the property thus situated, and takes it as a general trustee of the kingdom. In analogy, therefore, to the admitted condition of allodial property, and in conformity to the reason and justice of the thing, when the owner of real estate dies without heir, the State is *ultimus hæres*, and takes the property for the benefit of all.

NOTE. — See, *accord*, *Wallace v. Harmstad*, 44 Pa. 492, 499. This case would seem to be inconsistent with *Ingersoll v. Sergeant*, 1 Wh. 337, but does not profess to overrule it.

It will rarely occur that there will be any difference in result whether a court holds that land is allodial, subject to be taken by the State in case of the death of the owner without heirs, or that it is held of the State, as lord (provided it be also held that the Statute of *Quia Emptores* is in force). There is but little authority on the point. In a number of States, including New York, a person having a fee simple in land is now declared, by statute, to be the absolute owner.

See the learned discussion of the matter in Gray, *Rule against Perpetuities*, 2nd ed., §§ 22-28.

## CHAPTER II.

### ESTATES OR TENANCIES.

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#### A. In Fee Simple.

##### LITTLETON, TENURES, § 1.

TENANT in fee simple is he which hath lands or tenements to hold to him and his heirs forever. And it is called in Latin *feodum simplex*, for *feodum* is the same that inheritance is, and *simplex* is as much as to say, lawful or pure. And so *feodum simplex* signifies a lawful or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase, To have and to hold to him and to his heirs: for these words, his heirs, make the estate of inheritance. For if a man purchase lands by these words, To have and to hold to him for ever, or by these words, To have and to hold to him and his assigns for ever; in these two cases he hath but an estate for term of life, for that there lack these words, his heirs, which words only make an estate of inheritance in all feoffments and grants.

NOTE. — *Bean v. French*, 140 Mass. 229, 231: "It is the settled rule, that, in a deed to an individual, the word 'heir' is necessary to create an estate of inheritance in the grantee, if he takes to his own use, and not in trust."

This rule has been followed by most courts, but it has been changed by statute in many States. And see 44 & 45 Vict. c. 41, § 51.

It never applied to devises. See Co. Lit. 9 b.

In the United States, it has not been applied to conveyances in trust. See *Newhall v. Wheeler*, 7 Mass. 189.

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### JOHNSON v. WHITON.

150 Mass. 424. 1893.

CONTRACT, to recover a deposit paid under an agreement to purchase land, which provided that in case the title was defective the vendor should refund the deposit. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court,

on appeal, on agreed facts, the material portions of which appear in the opinion.

HOLMES, J. This is an action to recover a deposit paid under an agreement to purchase land. The land in question passed under the seventh clause of the will of Royal Whiton to his five grandchildren, and a deed executed by them was tendered to the plaintiff, but was refused on the ground that one of the grandchildren, Sarah A. Whiton, could not convey a fee simple absolute, and this action is brought to try the question. The clause of the will referred to is as follows: "After the decease of all my children, I give, devise, and bequeath to my granddaughter, Sarah A. Whiton, and her heirs on her father's side, one third part of all my estate, both real and personal, and to my other grandchildren and their heirs respectively the remainder, to be divided in equal parts between them."

We see no room for doubt that the legal title passed by the foregoing clause. We think it equally plain that the words "and her heirs on her father's side" are words of limitation, and not words of purchase. The only serious question is whether the effect of them was to give Sarah A. Whiton merely a qualified fee, and whether by reason of the qualification she is unable to convey a fee simple. We do not think that it would be profitable to follow the discussions to be found in 1 Prest. Est. 449 *et seq.*, and Challis, Real Prop. 215 *et seq.* By the old English law, to take land by descent a man must be of the blood of the first purchaser; Co. Lit. 12 a; 2 Bl. Com. 220; and by the St. 3 & 4 Will. IV. c. 106, § 2, descent is traced from the purchaser. For instance, if the land had been acquired in fee simple by Sarah A. Whiton's father, it could have descended from her only to her heirs on her father's side. The English rule means that inherited property does not pass from one line to the other, and is like the rule of the French customary law, *Propres ne remontent pas*. P. Viollet, Hist. du Droit Civil Franç. (2d ed.) 845. In this state of the law of descent it was no great stretch to allow a limitation in the first instance to Sarah of a fee with the same descendible quality that it would have had in the case supposed. Challis, Real Prop. 216, 222, 224; Co. Lit. 220 b. *Blake v. Hynes*, 11 L. R. Ir. 284. 1 Prest. Est. 474. See St. 22 & 23 Vict. c. 35, § 19. Especially is this true if, as Mr. Challis argues, the grantee under such a limitation could convey a fee simple, just as he or she could have done if the estate actually had descended from the father. But our statute of descent looks no further than the person himself who died seised of or entitled to the estate. In other words, inherited property may pass from one line to the other in Massachusetts. Pub. Sts. c. 125. The analogy on which is founded the argument for the possibility of limitations like that under discussion is wanting. A man cannot create a new kind of inheritance. Co. Lit. 27. Com. Dig. Estates by Grant (A 6). These and other authorities show, too, that except in the case of a grant by

the King, if the words "on her father's side" do not effect the purpose intended, they are to be rejected, leaving the estate a fee simple, which was Mr. Washburn's opinion. 1 Washb. Real Prop. (5th ed.) 61. Certainly it would seem that in this Commonwealth an estate descending only to heirs on the father's side was a new kind of inheritance.

What we have to consider, however, is not the question of descent, but that of alienability; and that question brings a further consideration into view. It would be most unfortunate and unexpected if it should be discovered at this late day that it was possible to impose such a qualification upon a fee, and to put it out of the power of the owners to give a clear title for generations. In the more familiar case of an estate tail, the Legislature has acted and the statute has been carried to the farthest verge by construction. Pub. Sts. c. 120, § 15; *Coombs v. Anderson*, 138 Mass. 376. It is not too much to say that it would be plainly contrary to the policy of the law of Massachusetts to deny the power of Sarah A. Whiton to convey an unqualified fee.

*Judgment for defendant.*

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### FIRST UNIVERSALIST SOCIETY v. BOLAND.

155 Mass. 171. 1892.

ONE Clark deeded land to the plaintiff, to have and to hold so long as said land should be devoted to the uses, interests, and support of those doctrines of the Christian religion embraced in the Confession of Faith adopted by the General Convention of Universalists, held, etc. The question was whether plaintiff had a marketable title in such land.

ALLEN, J. The grant to the plaintiff was to have and to hold, etc., "so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion," as specified. "And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons," etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as

the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Walsingham's Case*, 2 Plowd. 557, is "as long as the church of St. Paul shall stand." *Brattle Square Church v. Grant*, 3 Gray, 142, 147; *Easterbrooks v. Tillinghast*, 5 Gray, 17; *Ashley v. Warner*, 11 Gray, 43; *Attorney General v. Merrimack Manuf. Co.*, 14 Gray, 586, 612; *Fifty Associates v. Howland*, 11 Met. 99, 102; *Owen v. Field*, 102 Mass. 90, 105; 1 Washb. Real Prop. (3d ed.) 79; 2 Washb. Real Prop. (3d ed.) 20, 21; 4 Kent Com. 126, 127, 132, note; 2 Crabb, Real Prop. §§ 2135, 2136; 2 Flint. Real Prop. 230, 232; Shep. Touchst. 121, 125.

A question or doubt, however, has arisen, though not urged by counsel in this case, whether after all there is now any such estate as a qualified or determinable fee, or whether this form of estate was done away with by the Statute *Quia Emptores*. See Gray, Rule against Perpetuities, §§ 31-40, where the question is discussed and authorities are cited. We have considered this question, and whatever may be the true solution of it in England, where the doctrine of tenure still has some significance, we think the existence of such an estate as a qualified or determinable fee must be recognized in this country, and such is the general consensus of opinion of courts and text writers. *Jamaica Pond Aqueduct v. Chandler*, 9 Allen, 159, 168; *Leonard v. Burr*, 18 N.Y. 96; *Gillespie v. Broas*, 23 Barb. 370; *State v. Brown*, 3 Dutch. 13; *Henderson v. Hunter*, 59 Penn. St. 335; *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 94 Ill. 83, 93; 1 Washb. Real Prop. (3d ed.) 76-78; 4 Kent Com. 9, 10, 129. See also, of English works in addition to citations above, Shep. Touchst. 101; 2 Bl. Com. 109, 154, 155; 1 Cruise Dig. tit. 1, §§ 72-76; 2 Flint. Real Prop. 136-138; 1 Prest. Est. 431, 441; Challis, Real Prop. 197-208.

Since the estate of the plaintiff may determine, and since there is no valid limitation over, it follows that there is a possibility of reverter in the original grantor, Clark.

[The court held, accordingly, that the title of the plaintiff was imperfect.]

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### B. In Fee Tail.

#### STATUTE DE DONIS.

13 Edw. I, c. 1. 1285.

FIRST, concerning lands that many times are given upon condition, that is, to wit, where any giveth his land to any man and his wife, and

to the heirs begotten of the bodies of the same man and his wife, with such condition expressed that if the same man and his wife die without heir of their bodies between them begotten, the land so given shall revert to the giver or his heir; in case also where one giveth lands in free marriage, which gift hath a condition annexed, though it be not expressed in the deed of gift, which is this, that if the husband and wife die without heir of their bodies begotten, the land so given shall revert to the giver or his heir; in case also where one giveth land to another and the heirs of his body issuing, it seemed very hard and yet seemeth to the givers and their heirs, that their will being expressed in the gift was not heretofore nor yet is observed. In all the cases aforesaid after issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to aliene the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift: and further, when the issue of such feoffee is failing, the land so given ought to return to the giver or his heir by form of gift expressed in the deed, though the issue, if any were, had died; yet by the deed and feoffment of them, to whom land was so given upon condition, the donors have heretofore been barred of their reversion of the same tenements which was directly repugnant to the form of the gift: wherefore our lord the king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing.

NOTE. — Estates in fee tail arose by force of this statute. For the effect, at common law, of a gift to a man and the heirs of his body see Leake, *Law of Property in Land*, p. 35, and *Burnett v. Burnett*, 17 S.C. 545.

A tenant in tail was permitted by the courts to convey an estate in fee simple, through the operation of a collusive suit, called a common recovery. This seems to have been first sanctioned in 1473, in *Taltarum's Case*, Y.B. 12 Edw. IV. 19. For the details of such collusive suit see Blackstone, *Commentaries*, Book II, pp. 357 *et seq.*

By St. 3 and 4 Will. IV, c. 74, a tenant in tail was empowered to convey a fee simple by the "more simple modes of assurance" therein provided.

An estate could be given to a man, or woman, and the heirs of his, or her, body, by any spouse, in which case it was a fee tail general;



or by a specified spouse, in which case it was a fee tail special. An estate could be given to a man, or woman, and the heirs male of his, or her, body, in which case it was a fee tail male; or the heirs female, in which case it was a fee tail female. See Littleton, Tenures, §§ 13 *et seq.*

The word "heirs" was as indispensable in creating a fee tail, as in creating a fee simple. The words "of the body" were those commonly used, but other words having the same significance were sufficient. Co. Lit. 20, a, b.

In the United States, estates in fee tail survive in a few, but only a few, States. The statutory provisions abolishing them are not uniform, — usually they either convert estates in fee tail into estates in fee simple, or convert them into life estates to the tenants, with remainders in fee simple to the issue of the tenants.

Wherever estates in fee tail survive, the tenant is allowed, in some simple manner, to convey the fee simple, — that is, to dock the entail.

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### C. For Life.

#### LITTLETON, TENURES, §§ 32, 56.

TENANT in fee tail after possibility of issue extinct is, where tenements are given to a man and to his wife in especial tail, if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. And if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet if the issue die without issue, so as there be not any issue alive which may inherit by force of the tail, then the surviving party of the donees is tenant in tail after possibility of issue extinct.

Tenant for term of life, is where a man letteth lands or tenements to another for term of the life of the lessee, or for term of the life of another man. In this case the lessee is tenant for term of life. But by common speech, he which holdeth for term of his own life, is called tenant for term of his life; and he which holdeth for term of another's life, is called tenant for term of another man's life.

NOTE. — In *Roseboom v. Van Vechten*, 5 Den. (N.Y.) 414, the court said (p. 424): "Under the will of Jacob Roseboom, his widow acquired an estate *durante viduitate* in this lot of land. That was an estate for her life, determinable on her ceasing to be such widow, and during its continuance was a freehold."

In *Warner v. Tanner*, 38 Ohio 118, land was conveyed to one Bartlett "while said premises shall be used as and for manufacturing cheese." The court said (p. 121): "It is well settled that if one grant an estate to a man and woman during coverture, or as long as the

grantee or lessee shall dwell in such a house or use the premises for a specified purpose, as, for instance, the manufacture of cheese thereon, or for any like uncertain time, the grantee or lessee has in judgment of law a freehold."

The estate would seem to be a life estate if it is determinable at the will of a person other than the landlord. Thus, if A gives land to B, to hold so long as C wishes. See *Beeson v. Burton*, 12 C. B. 647. MAULE, J., said (p. 659): "It is well established that an estate which may last for a man's life is, ordinarily, a freehold. An estate for life, determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold."

If land were given to A, for the life of B, and A died, during the life of B, "he that first entreteth shall hold the land during the other man's life." Co. Lit. 41 b. A person who so entered was called a common occupant. If land were given to A, to have and to hold to him and his heirs during the life of B, and A died, during the life of B, the heirs of A would take, not by descent, but as special occupants. But statutes have now altered the common law, the residue of the term, on the death of A, going in some States to A's executor or administrator, and in other States to A's heirs.

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#### KENT, COMMENTARIES.

Vol. II, p. 130.

If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy.

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#### LITTLETON, TENURES, §§ 35, 36.

TENANT by the curtesy of England is where a man taketh a wife seised in fee simple, or in fee tail general, or seised as heir in tail especial, and hath issue by the same wife, male or female born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life by the law of England. And he is called tenant by the curtesy of England, because this is used in no other realm but in England only.

And some have said, that he shall not be tenant by the curtesy, unless the child, which he hath by his wife, be heard cry; for by the cry it is proved that the child was born alive. Therefore *quære*.

Tenant in dower is where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty, by metes and bounds, for term of her life, whether she hath issue by her husband or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, for she must be above nine years old at the time of the decease of her husband, otherwise she shall not be endowed.

NOTE. — By statute, the rules of the common law set forth in the above extracts from Kent and Littleton have been greatly changed. Usually, a husband has no right in his wife's land, other than his right of curtesy. The extent of the rights given to the spouse by curtesy and dower, and the conditions precedent to the creation of such rights, have also been frequently altered by statutes.

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WILLIAMS v. LAMBE.

3 Bro. Ch. 264. 1791.

THIS was a bill for dower, stating that the plaintiff was lawfully married to William Williams, and continued his wife to the time of his death. That William Williams being seised of lands, etc., situated in Delwyn, in the county of Hertford, during the coverture, in February, 1783, sold the same to the defendant, who entered into possession of the same, and that William Williams died in May, 1786, leaving the plaintiff his widow. The bill, therefore, prayed a discovery of the lands, and that defendant might assign to her one third part, as her dower. The defendant pleaded to the discovery and relief, that he was a purchaser of the estate (subject to a mortgage) for valuable consideration, without notice of the vendor being married.

LORD CHANCELLOR said the only question was, whether a plea of purchase without notice, would lie against a bill to set out dower: that he thought where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable not to a legal claim; he therefore overruled the plea.

NOTE. — In *Grady v. McCorkle*, 57 Mo. 172, the court said (p.174):

"The right of dower attaches whenever there is a seizin by the husband during the marriage, and unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death. After the right of dower has once attached, it is not in the power of the husband alone to defeat it by any act in the nature of an alienation or charge. It is a right in law, fixed from the moment the facts of marriage and seizin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act. (Co. Lit. 32 a.) The alienation of the husband, therefore, whether voluntary, as by deed or will, or involuntary, by proceedings against him or otherwise, will confer no title on the alienee, as against the wife in respect of her dower. It is a necessary consequence of this rule, that all charges or derivative interest created by the husband, subsequent to the attachment of the wife's right, are voidable as to that part of the land which is recovered in dower."

Similarly, after married women were given the legal capacity to convey land, the conveyance by a married woman of land owned by her did not defeat her husband's right of curtesy therein. *Johnson v. Fritz*, 44 Pa. 449.

But these rules have frequently been altered by statute.

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#### *D. For Years.*

#### LITTLETON, TENURES, § 58.

TENANT for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years.

NOTE. — Blackstone said (Commentaries, Book II, p. 140): "An estate for years is a contract for the possession of lands or tenements, for some determinate period. . . . If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years."

There is no limit, at common law, to the length of a term for years.

Co. Lit. 45 b: "A man maketh a lease for 21 years if J. S. live so long; this is a good lease for years."

Co. Lit. 46 b: "And true it is, that to many purposes he is not tenant for years until he enter; as a release made to him is not good to him to increase his estate, before entry; but he may release the rent reserved before entry, in respect of the privity. Neither can the lessor grant away the reversion by the name of the reversion, before

entry. But the lessee before entry hath an interest, *interesse termini*, grantable to another."

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*E. From Year to Year.*

NOTE. — The law permits what may be called running leases. Thus A leases to B from year to year. Unless the lessor and lessee have otherwise agreed, such a lease may only be terminated, by either the lessor or the lessee, by six months' notice, directed to the end of the year. If neither gives such notice, the lease continues on the same terms for another year, and so on.

There may be running leases for periods other than a year, — thus, from month to month, or week to week. These may respectively be terminated by a month's notice, directed to the end of the month; or a week's notice directed to the end of the week.

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*F. At Will.*

LITTLETON, TENURES, § 68.

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him.

NOTE. — Co. Lit. 55 a: "Every lease at will must in law be at the will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also."

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*G. At Sufferance.*

COKE UPON LITTLETON, 57 b.

THERE is a great diversity between a tenant at will and a tenant at sufferance; for tenant at will is always by right, and a tenant at sufferance entereth by a lawful lease, and holdeth over by wrong. A tenant at sufferance is he that at the first came in by lawful demise, and after his estate ended continueth in possession and wrongfully holdeth over.

NOTE. — See *Rising v. Stannard*, 17 Mass. 282, 288.

## LITTLETON, TENURES, § 57.

AND every one which hath an estate in any lands or tenements for term of his own or another man's life, is called tenant of freehold, and none other of a lesser estate can have a freehold: but they of a greater estate have a freehold; for he in fee simple hath a freehold, and tenant in tail hath a freehold, etc.

## CHAPTER III.

JOINT TENANTS, PARCENERS, AND TENANTS IN  
COMMON.

## BLACKSTONE, COMMENTARIES.

Book II, pp. 180, 182, 183, 185, 187, 188, 192, 193, 194.

AN estate in joint tenancy is where lands or tenements are granted to two or more persons, to hold in fee simple, fee tail, for life, for years or at will.

The creation of an estate in joint tenancy depends on the wording of the deed or devise, by which the tenants claim title: for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs; this makes them immediately joint tenants in fee of the lands.

The entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate whatever it be.

If one joint tenant aliens and conveys his estate to a third person; here the joint tenancy is severed, and turned into tenancy in common; for the grantee and the remaining joint tenant hold by different titles (one derived from the original, the other from the subsequent, grantor).

If an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout et non per my*: the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.

An estate held in coparcenary is where lands of inheritance descend from the ancestor to two or more persons. It arises either by common law or particular custom. By common law: as where a person seised in fee-simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives: in this case they shall all inherit, as will be more fully shown when we treat of descents hereafter; and these co-heirs are

then called coparceners; or, for brevity, parceners only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.

They are properly entitled each to the whole of a distinct moiety; and of course there is no *jus accrescendi*, or survivorship between them, for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent, and united in possession, so long are the tenants therein, whether male or female, called parceners.

If one parcener aliens her share, though no partition be made, then are the lands no longer held in coparcenary, but in common.

Tenancy in common may be created, either by the destruction of the two other estates, in joint-tenancy and coparcenary, or by special limitation in a deed. . . . Care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy rather than tenancy in common; because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied, by joint-tenancy, as they must necessarily be upon a tenancy in common.

There is no survivorship between tenants in common.

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### RIGDEN v. VALLIER.

3 Atk. 731. 1751.

A FATHER gave certain property to his daughters, "to be equally divided between them." The question was whether a surviving sister took, to the exclusion of those entitled to the property of a deceased sister.

LORD CHANCELLOR HARDWICKE. Equally to be divided is now established to be a tenancy in common in a will, or if it was equally only, without the subsequent words annexed to it, would be so construed.

But then it is insisted to be otherwise in the case of a deed; and though I do not find any solemn determination of this sort, yet the distinction to be sure is often made in the books.

In the case of *Fisher versus Wigg*, in 1 P. W. 14, and 1 Lord Raym. 622, there was a surrender of a copyhold estate to the use of A, B, and C and their heirs, equally to be divided betwixt them and their heirs respectively. This was held by Mr. Justice GOULD and TURTON a tenancy in common, by reason of the apparent intent of the sur-



render, against the opinion of Lord Chief Justice Holt, who thought it a joint tenancy.

I do not find that this judgment has been reversed, so that it is undoubtedly an authority.

The case in 2 Vent. 367, in Chancery, is also to the same purpose, where a covenant to stand seised to the use of A for life, and afterwards to two equally to be divided, and their heirs and assigns for ever, was adjudged by the Lord Keeper North to be a tenancy in common.

I have had the register searched for this case, and cannot find it; but notwithstanding it was not entered, it might have been so determined, and is so cited by Mr. Justice Turrton in *Fisher versus Wigg*.

*Hammerton versus Clayton*, 14 Car. 2, Rot. 43, was adjudged a tenancy in common upon the same words; but this case is not much to be depended upon, because at the end of Lord Raymond's report of *Fisher versus Wigg* it is said to be cited by Sir Edward Northey only, and the case was not to be found.

In the case of *Smith versus Johnson*, Pasch. 32 Car. 2, in the Court of King's Bench, there was a feoffment to two and their heirs, equally to be divided between them, to the use of them and their heirs: upon the breaking of the case, Scroggs, Chief Justice, and Dolben, Justice, were of opinion that it was a tenancy in common; but Jones, Justice, was of another opinion, upon the difference between a deed and a will.

But notwithstanding there was a rule in that case for judgment *nisi*, yet nobody being satisfied with the opinion, the rule was upon motion set aside, and it was made an *ulterius concilium*, and ended afterwards by the death of the parties.

In the present case I think it a tenancy in common, whether the instrument be considered as a deed, or a will.

NOTE. — In *Caines v. Lessee of Grant*, 5 Bin. (Pa.) 119, YEATES, J., said (p. 122): "In ancient times, courts of law favoured joint-tenancies, in order to prevent the splitting of tenures and services, 1 Wms. 21. But the statute 12 Car. 2, c. 24, s. 1, has reduced the several sorts of tenure, to socage tenure only, and the reason of the law having ceased upon the abolition of tenures, courts of law incline the same way with chancery. 1 Wils. 165, 3 Atk. 525. Courts of equity, however, had long before been favourable to tenancies in common, wherever they could lay hold of any words to construe it so, from its being a greater equality, a better provision, and preventing estates from going by accident contrary to the intent. 1 Ves. 166. While the laws of this commonwealth continue in their present state, and certain words in conveyances and wills have the legal operation of conferring an estate in joint-tenancy, we are imperiously bound so to declare it. But where two or more persons, with or without

families, have joined together, to take up or purchase lands, in order to advance their fortunes in life, I should require strong proof to satisfy my mind, that they meditated survivorship in their transactions, and gambled their lives respectively against each other."

Statutes are now common, changing the common-law rule, and providing, in substance, that conveyances to two or more persons shall create tenancies in common, and not joint tenancies, unless it appears that it was the intent of the parties to create joint tenancies.

In *Parsons v. Boyd*, 20 Ala. 112, the court said (p. 118): "Our statute, it is true, has done away with all joint tenancies, as known at the common law, and declares that when two or more persons shall hold an estate, real or personal, jointly, and one joint tenant dies before severance, his interest in the joint estate shall not survive to the remaining joint tenant or joint tenants, but shall descend to, and be vested in, his heirs or other legal representatives, in the same manner as if his interest had been severed and ascertained; Clay's Dig. 169. This act, however, only applies to such joint tenants as hold the absolute property in their own right, and not to those who hold as trustees merely, or in *autre droit*. The evil that our statute intended to remedy was, to cut off the *jus accrescendi*, or right of survivorship, which existed at the common law, and to give to the heirs at law of joint tenants the interest of their ancestors, in the same manner as if they had held as tenants in common, and not as joint tenants. It was thought unreasonable that the death of one joint tenant should give the entire estate to the survivor *for his own use*, to the exclusion of the heirs or next of kin of the deceased tenant. But when the tenants hold as trustees for particular purposes, or in *autre droit*, and can gain no advantage to themselves by the right of survivorship, then they are not within the reason of the statute, nor does the evil exist which it intended to remedy, for no profit or benefit will result to the survivor, and although he take, by the death of his co-tenant, the entire legal title, yet he will hold it as trustee, or in the right of another, and for his use and benefit. Joint trustees are not within the reason of the statute, nor the evil intended to be remedied by it, and to hold that their joint title is affected by the act, could be productive of no good; it could avoid no evil, but, on the contrary, might often lead to protracted litigation, and serious injury to the trust estate."

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BOLAND v. MCKOWEN.

189 Mass. 563. 1905.

CONTRACT by the surviving payee of a note made to the plaintiff and her husband Edward J. Boland and secured by a mortgage of

real estate, to recover an instalment of interest due on the note. Writ dated March 15, 1905.

The defendants admitted liability and paid the money into court, and Edward J. Boland, Jr., executor under the will of the plaintiff's late husband, intervened as a claimant.

In the Superior Court the case was heard on an agreed statement of facts. The petition of the claimant was dismissed, and judgment was ordered for the plaintiff. The claimant appealed.

KNOWLTON, C.J. In 1894 certain real estate was conveyed to Edward J. Boland and Agnes Boland, these persons being husband and wife. In 1902 they conveyed the property to Catherine McKowen and took back from her, on the same day and as a part of the same transaction, a mortgage to secure a part of the purchase money. The mortgage runs to "said Edward J. Boland and Agnes Boland and their heirs," etc., and the note secured by it is payable in like manner to them jointly. Edward J. Boland having deceased, and the note remaining unpaid, the question before us is whether his widow, Agnes Boland, has a right to collect it, or whether the executor of the husband's will, Edward J. Boland, Jr., the present claimant, is entitled to one half of it. The estate of the husband is ample to pay his debts, so that the rights of creditors are not involved.

At common law a conveyance to two or more persons, without special provisions, created an estate in joint tenancy unless these persons were husband and wife, in which case it created an estate by entirety, which differs from a joint tenancy in the fact that the tenancy cannot be severed and the right of the survivor terminated by either party. *Shaw v. Harsey*, 5 Mass. 521; *Appleton v. Boyd*, 7 Mass. 131; *Wales v. Coffin*, 13 Allen, 213; *Pray v. Stebbins*, 141 Mass. 219. See also *Pease v. Whitman*, 182 Mass. 363; *McLaughlin v. Rice*, 185 Mass. 212. By the St. 1785, c. 62, § 4, the common law was changed, so that conveyances to two or more persons were to be interpreted as creating estates in common, unless it clearly appeared from the language that estates in joint tenancy were intended. It was held in the cases above cited that this statute did not apply to mortgages, or conveyances to husband and wife. The Rev. Sts. c. 59, §§ 10, 11, continue this statute in force, with an expressed provision, in accordance with the previous decisions, that it should not "apply to mortgages, nor to devises or conveyances made in trust, or made to husband and wife," and the provision remained without material change until the enactment of the St. 1885, c. 237. Gen. Sts. c. 89, §§ 13, 14; Pub. Sts. c. 126, §§ 5, 6. By St. 1885, c. 237, conveyances to husband and wife are included in the provisions in regard to conveyances to other persons, so that conveyances and devises to husband and wife, made since the enactment, do not create estates by entirety unless an intention to create such an estate is expressed in the writing. But in this as in the former statutes,

mortgages are excepted from the provision, and these are left to be governed by the rules of the common law.

In *Pray v. Stebbins*, *ubi supra*, and in *Phelps v. Simons*, 159 Mass. 415, it was held that the statutes in regard to the separate property and separate rights of married women do not affect the common law in regard to estates by entirety. In *Draper v. Jackson*, 16 Mass. 480, the court decided, in an elaborate opinion, that a note and mortgage made to husband and wife go to the wife, if she survives her husband, and not to the executor of the husband. As a general proposition, this is the law to-day; for except the St. 1885, c. 237, just cited, there is nothing in the statutes in regard to married women which extends or limits their rights, as against their husbands, in reference to property held under deeds or contracts running to them jointly. As at the common law, husband and wife are left incapable of making ordinary contracts with one another.

Although this case presents no such question as that upon which the court divided in *Phelps v. Simons*, 159 Mass. 415 (see also *Draper v. Jackson*, 16 Mass. 480, 486), the discussion in that case recognized tenancies or ownership by entirety in personal property as well as in real estate. This view of the court is sustained by the cases cited in the opinion.

Upon the facts before us in the present case, we are of opinion that the plaintiff has the same rights as she would have had if the common law had remained unchanged.

*Judgment for the plaintiff affirmed.*

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### CLERK v. CLERK.

2 Vern. 323. 1694.

SIR PHILIP WARWICK conveys his house of Frognall, and four farms to trustees upon trust, that his sisters, the Lady Turner, and Arabella Clerk, might cohabit in the capital house, and equally divide the rents and profits of the four farms betwixt them, and the whole to the survivor of them. Arabella Clerk in her lifetime makes a lease of her moiety to her daughter for eighty years, to commence upon her decease, if the Lady Turner should so long live, and soon after dies.

*First*, it was resolved, that this was a joint-estate, and not a tenancy in common; for although the words (equally to be divided betwixt them) sometimes in a will may make a tenancy in common only by way of construction, and that it was the intent of the testator that there should be a division or partition; yet if afterwards in the will it is declared, as in this case, it should go to the survivor, that would oust such construction, and it would be a joint-estate, even in the case of a devise by will.

Secondly, taking it to be a joint-estate, the lease made by Arabella, tho' to commence after her decease, is a severance of the joint-tenancy; and the lease of her moiety will be good against the survivor.

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*In re* WILFORD'S ESTATE.

L. R. 11 Ch. D. 267. 1879.

Two sisters, C. E. Wilford and H. J. Wilford, resided together, and they were, with other property, entitled, as joint tenants under the will of Mrs. Clarke, to certain leasehold houses. The solicitors, who acted for the sisters in matters of business, did not keep separate accounts of the moneys which belonged to each, as they had a joint purse. In 1866 some of the leasehold houses were sold, and the moneys received were, with other moneys contributed by the sisters, lent upon mortgage on their joint account. The loan was paid off in January, 1877, to H. J. Wilford.

On the 5th of June, 1861, the sisters made their wills, and thereby each gave her property to the other absolutely, and appointed her sole executrix.

On the 10th of September, 1872, each sister made a will giving her real and personal estate to the other for life, and after her death subject to certain legacies to certain nieces in equal shares, the terms of the will being identical except in the interchange of the donees for life.

Mr. Taylor, a nephew, and one of the trustees named in both wills, deposed that he, on the 22nd of August, was present with his aunts by appointment, and that they stated that it was the intention of each of them to make a will in favour of the other, so that the survivor should have the whole of the property which had been bequeathed to them by Mrs. Clarke, i.e., they agreed to divide it equally between them in this way: that the survivor should have the income for life, and that after her decease the property should go to certain persons to whom they had agreed it should be bequeathed; that that understanding was definitely arranged by them in his presence, and that at another interview on the 11th of September, 1872, they told him that each had made a will to carry out the arrangement. After the death of C. E. Wilford, which occurred on the 17th of November, 1873, H. J. Wilford made a will on the 1st of March, 1876, and disposed of her property in a manner different from the bequest in her will of 1872, and thereby she gave it to the children of her nephew, F. Taylor, who should be living at her death, in equal shares. H. J. Wilford having died, an action was brought for the administration of the estate of C. E. Wilford. Judgment was given in the action in July, 1878, and certain accounts and inquiries

ordered to be taken and made. Two of the residuary legatees under the will of H. J. Wilford had obtained leave to attend the proceedings in the action, and on their behalf it was contended that H. J. Wilford became absolutely entitled as survivor to her sister's moiety of the property under Mrs. Clarke's will, on the ground that there had been no severance of the joint tenancy in it by the transactions which had taken place.

This was a summons taken out by the plaintiffs, asking that the accounts and inquiries might be taken and made on the footing that there had been a severance of the joint tenancy in the property.

HALL, V.C. I am of opinion that there was a severance of the joint tenancy in this property by the transaction which H. J. Wilford carried out with her sister in 1872. The case is a peculiar one, no case that I am aware of having occurred before in which the question has arisen from a transaction like this. The joint tenants agreed to make mutual wills. Before that they made wills by which they gave their property to each other absolutely, but in 1872 they agreed to make wills under which the survivor should take the property for her life only, and after her decease that it should be held for the benefit of certain nieces of each of them. That agreement, which was a dealing by each of the sisters with her moiety of the joint property, is proved by Mr. Taylor's evidence. It was acted upon by both sisters, their wills being made in accordance with it, and it effected, in my opinion, a severance of the joint tenancy. It would be a monstrous thing to hold, after the agreement had been so far perfected, that after the death of one sister the other could claim the joint property as belonging absolutely to her as survivor. There appears to me to be ample evidence of the agreement and of part performance of it, and I hold that the parties who claim under the will of C. E. Wilford are entitled to have the property administered, on the footing that the transaction of the sisters created a tenancy in common.

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KENT, COMMENTARIES.

Vol. iv, p. 387.

By the New York Revised Statutes, persons who take by descent under the statute, if there be more than one person entitled, take as tenants in common, in proportion to their respective rights; and it is only in very remote cases, which can scarcely ever arise, that the rules of the common-law doctrine of descent can apply. As estates descend in every state to all the children equally, there is no substantial difference left between coparceners and tenants in common. The title inherited by more persons than one, is, in some of the states, expressly declared to be tenancy in common, as in New York and

New Jersey: and where it is not so declared, the effect is the same; and the technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States.

NOTE. — But see *Gilpin v. Hollingsworth*, 3 Md. 190.

## CHAPTER IV.

REVERSIONS, RIGHTS OF ENTRY FOR CONDITION  
BROKEN, VESTED AND CONTINGENT REMAINDERS.  
HEREIN OF THE RULE IN SHELLEY'S CASE.

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COKE UPON LITTLETON, 22b.

A REVERSION is where the residue of the estate always doth continue in him that made the particular estate, or where the particular estate is derived out of his estate, as here. [Littleton said (§ 19): "In every gift in tail without more saying the reversion of the fee simple is in the donor."] Tenant in fee simple maketh gift in tail, so it is of a lease for life or for years. . . .

If a man make a gift in tail, or a lease for life, the remainder to his own right heirs, this remainder is void, and he hath the reversion in him.

NOTE. — There may be a reversion in an estate, less than a fee simple. Thus if tenant for life makes a lease for years, no matter how long such term of years may be (see *Earl of Derby v. Taylor*, 1 East 502), or if tenant for years makes a sublease.

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KING v. DUNHAM.

31 Ga. 743. 1861.

JENKINS, J. Complainants seek by their bill to set aside a decree rendered in a former suit in Chancery (which they attach as an exhibit), reforming the marriage settlement of Thomas K. Dunham and Sarah A., his wife (formerly Anderson), to which they were not parties. They claim to have had under the original settlement an interest, which was divested by the decree reforming it. They allege, that not having been parties to that suit, they are not bound by the decree, and this is undoubtedly true. But there is a preliminary question which must be determined in their favor before their right to impeach the former decree can be recognized, viz.: whether they had a vested interest under the marriage settlement anterior to its reformation. By the terms of the settlement the property was settled to the use of the parties to the marriage during their joint lives, then



to the use of the survivor, then to the issue of the marriage, his, her, or their heirs and assigns, if such there be, and in default of such issue, to the "heirs of the wife, (the property being hers,) the property reverting back after the death of the survivor to the heirs of Sarah Anderson, their heirs, executors, administrators and assigns, and not the heirs of the said Thomas K. Dunham." It is under the last clause that complainants claim to take as purchasers. If they did so take upon the execution of the marriage settlement, the subsequent decree reforming it did infringe their vested rights, and they are entitled to be heard now, in opposition to the validity of that decree, but not otherwise.

After the termination of the life-estates created by the settlement, and on failure of issue of the marriage, the remainder was limited to the heirs of the grantor. To enable the plaintiffs in error to take as purchasers these words, "the heirs of Sarah Anderson," must appear to be descriptive of certain persons to the exclusion of all others. Had the grantor used the words, "to the heirs of said Sarah A. now living," or "to such persons as would be the heirs of the said Sarah A. were she now dead," then the words would be *descriptio personarum*, and those answering that description would have taken as purchasers. There must be some words amounting to a description of a person, or of persons, or something in the context clearly indicating that the remainder, so created, shall vest. 1st Fearn on Rem's, 208. Where the word "heirs" only is used, it must be taken in its most general sense, as referring to those persons who, upon the death of the grantor (in this case), would be her heirs. "*Nemo est heres viventis*," and where the term is used in this general sense, the identification of those to take upon the happening of the contingency, is necessarily postponed to the death of that person, as whose heirs they are to take. In this view, had the plaintiffs in error died before the grantor, they of course could not have taken, nor could their heirs through them.

Again, had the grantor survived her husband, Dunham (there being no children of this marriage), and then married again, not having survived her second husband, had then died, leaving children of the second marriage, and the plaintiffs in error surviving her, the latter could not have taken, because the children of the second marriage having intervened, would have been her heirs to their exclusion. Then it is clear that no interest vested in them.

But to escape this conclusion, we are called upon to hold, that the words "heirs of Sarah A. Anderson" in this deed, mean such persons as would be her heirs should she die that instant — mean heirs apparent or presumptive. If there be any law for such construction we are not aware of it.

In our view of this case, there is no necessity to resort to the rule in Shelley's case, which has been pressed upon our consideration; and

consequently, the very able and learned argument of counsel for plaintiffs in error, in reply, to prove that it cannot be brought within that rule, does not control the case. These arguments have been highly entertaining and instructive, but we place the case upon another position assumed by counsel for defendants in error, viz: "A limitation to the heirs of the grantor will continue in himself as the reversion in fee." *Fearne on Remainders*, 50 and 51; *Preston on Estates*, 291; 1 *P. Williams*, 359; 2d *Blackstone's Com.* 241, note.

Thus considered, the reversion took effect in the grantor and upon her death the estate would have passed to such persons as then became her heirs at law; but as it could not be known who those persons would be until her death, no person took a vested interest during her life, and no person could take, under that clause, any interest whatever, vested, or contingent, as purchasers.

Had that clause been omitted entirely upon the happening of the specified contingency, the estate would have reverted, and would have passed to those whose heirship to the grantor was established by her death.

The deed does no more than specify the course to be taken by the estate, which it would have taken by law, without the specification.

In this view, Mrs. Dunham had a perfect right to consent to the proposed reformation of the settlement; and the decree, making that reformation with her consent, divested no pre-existing rights.

We affirm the judgment of the court sustaining the demurrer.

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#### LITTLETON, TENURES.

§§ 325, 326, 347.

ESTATES which men have in lands or tenements upon condition are of two sorts, viz. either they have estate upon condition in deed, or upon condition in law, etc. Upon condition in deed is, as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs yearly a certain rent, payable at one feast or divers feasts per annum, on condition that if the rent be behind, etc., that it shall be lawful for the feoffor and his heirs into the same lands or tenements to enter, etc. And if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, etc., that then it shall be lawful to the feoffor and his heirs to enter, etc. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them in his former estate to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed, etc.

In the same manner it is, if lands be given in tail, or let for term of life or of years, upon condition, etc.

The second thing is, that no entry nor re-entry (which is all one) may be reserved or given to any person, but only to the feoffor, or to the donor, or to the lessor, or to their heirs: and such re-entry cannot be given to any other person.

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WINN v. STATE.

55 Ark. 360. 1892.

HUGHES, J. This is an appeal from a judgment of the Pope circuit court, convicting appellant of a violation of section 1808 of Mansfield's Digest, which is as follows:

"Every person who shall take or keep possession of any real estate by actual force or violence, without the authority of law, or who, being armed with a deadly or dangerous weapon, shall by violence to any person entitled to the possession, or by putting in fear of immediate danger to his person, obtain or keep possession of any such real estate or property without legal authority, shall, on conviction, be adjudged guilty of a misdemeanor and be fined not less than fifty dollars and be imprisoned not exceeding one year."

D. F. Moore and R. L. Davis held possession of the real estate described in the indictment by virtue of a lease executed by the appellant, C. M. Winn. The lease was read in evidence, and was as follows:

"This indenture, made this 27th day of December, A.D., 1887, by and between C. M. Winn, and D. F. Moore and R. L. Davis, Witnesses: That the said C. M. Winn hereby leases unto said D. F. Moore and R. L. Davis, the following described piece of land, to wit:

"To hold for the term of six years from date; said lease expiring on the 27th day of December, A.D., 1893. And the said D. F. Moore and R. L. Davis, for themselves, their executors and administrators, do hereby covenant to and with the said C. M. Winn, his heirs and assigns, that they will dig a ditch the entire length of said piece of ground, extending along its north line, said ditch to be eighteen inches wide at top, twelve inches wide at bottom and eighteen inches deep. That they will have said land cleared and ditch dug by the middle of the second year of the term of lease; that they will build a lawful fence around said land, and keep the said fence in good repair during the time of said lease; and in case they fail to comply with any of the foregoing stipulations, they agree to forfeit said lease. Said C. M. Winn also hereby leases unto the said D. F. Moore and

R. L. Davis the following described piece of land, to wit: . . . To hold for the term of four years from this date, said lease expiring the 27th day of December, 1891. And the said D. F. Moore and R. L. Davis, for themselves, their executors and administrators, do hereby covenant, to and with the said C. M. Winn, his heirs and assigns, that they will enclose said piece of land with a lawful fence, and have said land in cultivation by the close of the first year of lease; and that they will keep said fence in good repair until the close or expiration of said lease; and if they fail to comply with any of the above stipulations, they hereby agree to forfeit said lease.

"In testimony whereof, we have hereunto set our hands, this 28th day of December, 1887.

"Witness:

"L. RUSSELL.

"C. M. WINN,

"D. F. MOORE.

"R. L. Davis."

Moore and Davis entered upon the land under the above lease, and remained in possession during the years 1888 and 1889, and until they were dispossessed by appellant. On the 5th day of February, 1890, they were served with a notice from appellant, declaring the lease forfeited, and prohibiting their going on the land in the future. A month afterwards, appellant, in the absence of his lessees, re-entered upon the land; and when Moore and his brother, to whom Davis had assigned his interest under the lease, attempted to come upon the premises, he prevented their so doing by threatening to kill them with a gun, with which he had armed himself. The State offered testimony to show that the stipulations in the lease had been performed, and that therefore there was no forfeiture; appellant offered to prove that the stipulations had not been performed. The court refused to admit this testimony. The jury returned a special verdict, finding that the defendant held the land by force, as charged in the indictment. Motions in arrest and for a new trial were filed and overruled, exceptions saved and appeal taken.

Were the stipulations in the lease that Moore was to make improvements as therein provided by a specified time conditions or covenants? The lease provides that if the lessees "failed to comply with any of its stipulations, they hereby agree to forfeit said lease." This we understand and construe to mean that if the lessees failed to comply with any of the stipulations of the lease within the time therein provided, then their rights thereunder should cease, and that they would surrender possession of the premises to the appellant on demand. See *Post v. Weil*, 115 N.Y. 366-69-70 and 71. We hold therefore that the stipulations were conditions and not covenants. Upon the breach of their conditions did a right of entry accrue to the appellant? If he was the owner of the property, he had a right to possession, upon breach of the conditions of the lease under which the lessees held. Under such a condition he was certainly entitled to

a re-entry for condition broken, though not to use force to effect the re-entry.

He used no force but took possession peaceably in the absence of the tenants from the premises, and if he had the lawful right to possession peaceably acquired, he had the right to protect his possession by force, if necessary, as well against his former tenants as any one else proposing to take possession without right. A clearer case of a landlord's right to use force can scarcely be stated than where a legal possession has been gained, and force is only employed to defend it. This is an undisputed right, according to a practically unanimous opinion wherever the question has arisen. 4 Am. Law Rev. 439. It is held in Vermont that "if one have the right to enter and take possession of premises in the occupancy of another, his entry will be legal and not contrary to the statute concerning forcible entry and detainer, if made while the other party is temporarily absent from the premises, leaving no one there." *Mussey v. Scott*, 32 Vt. 82.

It follows that the testimony excluded by the court as to the performance or non-performance by the lessees of the appellant of the stipulations in the lease in reference to improvements was material and necessary to enable the jury to determine whether appellant's entry was a lawful entry. This question should have been determined by the jury upon evidence.

For the error committed in the exclusion of this testimony the cause is remanded for a new trial.

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VAN RENSSELAER v. BALL.

19 N.Y. 100. 1859.

ACTION in the nature of ejectment, brought to recover the possession of one hundred and twenty-one and a half acres of land in the town of Berne, in the county of Albany, tried before Mr. Justice W. F. ALLEN, without a jury, in January, 1857.

The plaintiff gave in evidence an indenture executed by Stephen Van Rensselaer, the elder, now deceased, and William Ball, dated October 20th, 1792, by which the former conveyed to Ball the premises in question, in fee, reserving an annual rent, payable in wheat and fowls, and in a day's service each year. The indenture contains a covenant for the payment of rent, and clauses of distress and for re-entry, in all respects like those contained in the conveyance given in evidence in the case of *Van Rensselaer v. Hays*, 19 N.Y. 68. It was proved that W. Ball, the grantee, died about twelve or fourteen years before the trial, and that the defendant, his son, was in possession of a part of the premises, which was described in the testimony, having entered under his father. The defendant had paid rent for

his father during his lifetime; but it did not appear that any rent had been paid since his death.

DENIO, J. A condition annexed to a conveyance in fee that the grantee, his heirs and assigns shall pay to the grantor and his heirs an annual rent, and that in default of payment the grantor or his heirs may re-enter, is a lawful condition. Littleton puts it as an example of a condition in deed, at the commencement of that part of his treatise which relates to estates upon condition. Such an estate, he says, "is as if a man by deed indented enfeoffs another in fee simple, reserving to him and his heirs, yearly, a certain rent payable at one feast or divers feasts, per annum, on condition that if the rent be behind, etc., that it shall be lawful for the feoffor and his heirs to enter, etc., and if it happen the rent to be behind by a week after any day of payment of it, or by a month after any day of payment of it, or by half a year, etc., that then it shall be lawful for the feoffor, or his heirs to enter, etc. In these cases, if the rent be not paid at such time, or before such time limited and specified within the condition comprised in the indenture, then may the feoffor or his heirs enter into such lands or tenements, and them of his former estate, to have and hold, and the feoffee quite to oust thereof. And it is called an estate upon condition, because that the estate of the feoffee is defeasible, if the condition be not performed," etc. (§ 325.) The systematic writers upon the law of real property, from that time to the present, have assumed the legality of such conditions; and the substance of the condition in the conveyance under consideration is usually put as an example. 2 Bl. Com. 154; Cruise's Dig., vol. 2, ch. 1, § 1, pl. 3, 9; 4 Kent Com. 123. Among the numerous authorities referred to by the defendant's counsel, I have been unable to find a single dictum or the slightest hint that such conditions were contrary to law, or that they could only be attached to estates for life or years, or that a common-law tenure between the parties, or a reversion in the grantors, were necessary to uphold them.

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DOE v. BATEMAN.

2 B. & Ald. 168. 1818.

EJECTMENT for two messuages, in the parish of St. Luke, Chelsea. The demise was laid on the 26th December, 1817. The cause was tried at the sittings after Easter Term, 1818, before ABBOTT, J., when a verdict was taken for the plaintiff, subject to the opinion of the court, on a case which stated in substance as follows: The defendant Bateman being possessed of a term of years in the premises in question, by a lease dated 12th May, 1812, demised the premises

to Freeman, the lessor of the plaintiff, for a term co-extensive with his own term, reserving rent, and subject to certain conditions, one of which was, that Freeman should not open a public-house on the premises without the licence, in writing, of Bateman. The lease contained the usual clause for re-entry in case of a breach of any of the covenants or conditions. Freeman entered into the premises, and afterwards opened a public-house without having obtained the licence in writing of Bateman; and the latter having entered for the breach of this condition, this ejectment was brought by Freeman to recover the possession. This case was argued by Curwood for the plaintiff, and Taddy, Serjt., for the defendant. For the plaintiff it was contended, that the defendant having parted with his whole term, had no reversion, and therefore no right of entry for the condition broken; that, upon assigning his whole interest to the plaintiff, the privity of estate was destroyed, and that a right of entry could not be reserved to, or exist in, a stranger. On the other side it was insisted, that the condition was not destroyed by the defendant's having granted away the whole reversion; and the following authorities were cited: Litt. s. 347. 5 Vin. Ab. 312. pl. 17. Bac. Abr. tit. *Condition*, E. Co. Litt. 202 a.

*Cur. adv. vult.*

ABBOTT, C.J., now delivered the opinion of the court. This case was argued before us at Serjeants' Inn, and upon the facts found, the single question of law was this, whether a lessee for years, having made a conveyance operating as an assignment of his whole interest in the land, containing a covenant on the part of the assignee not to open a public-house on the demised premises without licence, and containing also a clause of re-entry on breach of the covenant, could upon an actual breach thereof enter upon the land and avoid his conveyance. Or, in other words, whether, if an assignment of a term of years be made upon a condition, the assignment shall be absolute and the condition void. No question arose as to the capacity of a real or personal representative to make the entry; for the entry was made by the assignor himself. The only argument adduced against the right of entry or validity of the condition was, that an entry must always be made by a person entitled to the reversion, and by no other; and consequently that as the original termor had in this case, by the deed of assignment, parted with his whole estate, and no reversion was left to him, he could not enter. And, to be sure, if the premises here assumed be true, the conclusion is properly drawn. But we think the premises from which the conclusion was drawn are untrue. And that they are untrue is manifest from the familiar case put in Lit. sect. 325, of a feoffment in fee rendering rent, with a clause of re-entry, if the rent be unpaid; in which case it is said the feoffor or his heirs may enter for the condition broken. In this case, the feoffor has no reversion; the lands are not, nor since the

Statute of *Quia Emptores*, can be holden of him, but must be holden of the superior lord of the fee. Another instance is also mentioned in Lord Coke's commentary upon this section, Co. Lit. fo. 202. According to the text of Littleton, the party making the entry shall have and hold the land in his former estate; but according to the commentary, although this is regularly true, yet it faileth in many cases, and one of the cases of failure is that of a feoffment in fee upon condition, made by a man seised in right of his wife. The feoffor dieth, and the condition is broken. The heir of the feoffor shall enter; yet the heir at the time of his entry hath no reversion, and after the entry his estate doth vanish, and presently the estate is vested in the wife. For these reasons, we think the defendant was entitled to the verdict, and the *postea* must be delivered to him.

*Judgment for defendant.*

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### RICE v. BOSTON & WORCESTER RAILROAD CORPORATION.

12 All. (Mass.) 141. 1866.

WRIT OF ENTRY to recover a parcel of land in Brighton.

At the trial in the superior court, before Vose, J., it appeared that on the 12th day of May, 1834, the demandant's father conveyed the demanded premises to the tenants by a deed of warranty, which stated that the conveyance was made upon the express condition that the corporation should forever maintain and keep in good repair a pass-way over the same, and also certain fences; the premises being land over which the railroad of the tenants passes. The demandant's father then, in June, 1842, conveyed to the demandant a large tract of land, the description of which included the demanded premises, by a deed of warranty; and died intestate, before any breach of condition. The demandant offered evidence of a breach of condition after his father's death. No entry for breach of condition was made before bringing this action. The judge excluded the offered evidence, and instructed the jury that the demandant was not entitled to recover; and a verdict was accordingly returned for the tenants. The demandant alleged exceptions.

BIGELOW, C.J. It is one of the established rules of the common law that the right or possibility of reverter which belongs to a grantor of an estate on condition subsequent cannot be legally conveyed by deed to a third person before entry for a breach. This rule is stated in Co. Litt. 214 a, in these words: "Nothing in action, entry or re-entry can be granted over;" and the reason given is "for avoiding of maintenance, suppressing of rights and stirring up of suits," which would happen if men were permitted "to grant before they be in



possession." This ancient doctrine had its origin in the early statutes against maintenance and champerty in England, the last of which, 32 Henry VIII. c. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of forfeiting the whole value of the land or interest granted, or, as Coke expresses it, "the grantor and grantee (albeit the grant be merely void) are within the danger of the statute." Co. Litt. 369 a. The principle that a mere right of entry into land is not the subject of a valid grant has been fully recognized and adopted in this country as a settled rule of the law of real property, both by text writers and courts of justice. 2 Cruise Dig. (Greenl. ed.) tit. xiii. c. 1, § 15. 1 Washburn on Real Prop. 453; 2 Ib. 599. 1 Smith's Lead. Cas. (5th ed.) 113. *Nicoll v. New York & Erie Railroad*, 2 Kernan, 133. *Williams v. Jackson*, 5 Johns. 498. *Hooper v. Cummings*, 45 Maine 359. *Guild v. Richards*, 16 Gray.

The effect of a grant of a right or possibility of reverter of an estate on condition is thus stated in 1 Shep. Touchstone, 157, 158: A condition "may be discharged by matter *ex post facto*; as in the examples following. If one make a feoffment in fee of land upon condition, and after, and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land, to the feoffee, or any other; by this the condition is gone and discharged forever." So in 5 Vin. Ab. Condition, (I. d 11.) the rule is said to be, "when condition is once annexed to a particular estate, and after by other deed the reversion is granted by the maker of the condition, now the condition is gone." See also 1 Washburn on Real Prop. 453. *Hooper v. Cummings*, 45 Maine, 359. The original maker of the condition cannot enforce it after he has parted with his right of reverter, nor can his alienee take advantage of a breach, because the right was not assignable. In the light of these principles and authorities, it would seem to be very clear that the original grantor of the demanded premises destroyed or discharged the condition annexed to his grant to the defendants by aliening the estate in his lifetime and before any breach of the condition had taken place.

The only doubt which has existed in our minds on this point arises from the fact that the son and heir of the original grantor of the premises is the demandant in this action. But on consideration we are satisfied, not only that the son took nothing by the deed, but also that the possibility of reverter was extinguished so that the original grantor had no right of entry for breach after his deed to his son, and the latter can make no valid claim to the demanded premises either as grantee or as heir for a breach of the condition attached to the original grant. A condition in a grant of land can be reserved only to the grantor and his heirs. But the latter can take only by virtue of the privity which exists between ancestor and heir. This privity is essential to the right of the heir to enter. But if the original grantor

alienes the right or possibility in his lifetime before breach, the privity between him and his heirs as to the possibility of reverter is broken. No one can claim as heir until the decease of the grantor, because *nemo est hæres viventis*; and upon his death his heir has no right of entry, because he cannot inherit that which his ancestor had aliened in his lifetime. The right of entry is gone forever. Perkins, §§ 830-833. Litt. § 347.

It may be suggested, however, that if the deed is void and conveys no title to the grantee, the right of entry still remains in the grantor and is transmissible to his heir. This argument is inconsistent with the authorities already cited, which sanction the doctrine that alienation by a grantor of an estate on condition before breach extinguishes the condition; it also loses sight of the principle on which the doctrine rests. The policy of the law is to discourage maintenance and champerty. Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of securing an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is therefore effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he has taken in contravention of the rules of law. Both parties are therefore cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law. It is always competent for a party in a writ of entry to allege that a deed, under which an adverse title is claimed, although duly executed, passed no title to the grantee, either because the grantor was disseised at the time of its execution, or because the deed for some other reason did not take effect. Stearns on Real Actions, 226.

We know of no statute which has changed the rules of the common law in this commonwealth in relation to the alienation of a right of entry for breach of a condition in a deed. By these rules, without considering the other grounds of defence insisted upon at the trial, it is apparent that the demandant cannot recover the demanded premises; not as heir, because he did not inherit that which his father had conveyed in his lifetime; nor as purchaser, because his deed was void.

*Exceptions overruled.*

## COKE UPON LITTLETON, 49 a.

"THE remainder" is a residue of an estate in land depending upon a particular estate, and created together with the same, and in law Latin it is called "*remanere*."

NOTE. — If A, tenant in fee simple of Blackacre, gave B an estate in tail, for life, or for years, and did no more, the reversion would be in A. But the common law permitted A, after giving the estate to B, to proceed and give other estates to other persons, — for example, A might give B an estate for life, C an estate for life, D an estate for life, and E an estate in fee. The estates given to C, D, and E were remainders.

The common law did not permit the creation of any future estates in favor of strangers, except remainders.

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FEARNE, ON CONTINGENT REMAINDERS, 261.

It is laid down as a rule in conveyances at common law, that every remainder must be so limited as to wait for the determination of the particular estate, before it is to take effect in possession; and not to take effect in prejudice or exclusion of the preceding estate. This rule not only flows of necessity from the definition of a remainder . . . but also follows, as the consequence of a maxim at common law, that none shall take advantage of a condition, but the party from whom the condition moves (i.e., the grantor) and his heirs. . . .

Thus, for instance; if a lease for life be made upon condition, that if a stranger pay to the lessor 20*l*. then immediately the land shall remain to the same stranger, this remainder, it seems, is void; for the tenant for life ought to have it during his life, and, if so, during that time the stranger cannot have it; for he can take no advantage of the condition.

NOTE. — "Conditions can only be reserved for the benefit of the grantor and his heirs." 4 Kent Com. 127.

After the passage of the Statute of Uses it was possible to give an estate to B, and to provide that, on an event, B's estate should be cut short and an estate to C should begin. See Chapter VIII, *infra*.

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BENNETT v. MORRIS.

5 Rawle (Pa.) 9. 1835.

LAND was given to Charlotte for life, and then to "her only heir during its life."

KENNEDY, J. By the terms of the will, the devise of the land to the daughter is limited to her expressly for life. This limitation, although express, would not perhaps be sufficient to take this devise out of the operation of the rule recognized and laid down in *Shelley's Case*, seeing there is a remainder over limited by the will to her heir. *Pauly v. Lowdall*, Sty. 249, 273; *Dubber v. Trollop*, 8 Vin. 233, tit. *Devise*, U. a. pl. 13; *Moore v. Parker*, Skin. 559; *Robinson v. Robinson*, 1 Burr. 38. But to this remainder to her heir there is also superadded an express limitation for the life of such heir, which goes to show clearly that the testator did not intend by his will to give to his daughter a fee-simple estate in the land, but that she should have barely an estate for her life; and that her heir or heirs, whoever he, she, or they might happen to be at her death, should take by purchase a remainder for life also. Besides, if he had intended that his daughter should have the fee in the land, it was unnecessary and useless in him to have made a will for that purpose, because she would have taken it by operation of law without.

The word "heir" then could not have been used here by the testator with a view to set forth the nature and *quantum* of estate intended to be given to his daughter, but for the purpose of describing the person who should have the remainder for life in the land after her death. It was meant by him to be understood as a *descriptio personæ*, as in *Haddon's Case*, where the testator "devised to one for life, and so afterwards to every person that should be his heir, for life only," and it was adjudged in the Common Pleas to carry an estate in possession to the tenant for life, with a remainder for life to the next heir, and nothing more. . . . Having now shown that the word "heir" in the case under consideration, must be construed a word of purchase and not of limitation, it in the next place becomes material to determine whether the remainder for life given to the heir of the first devisee, was vested or contingent. It is certain that the daughter could have no heir during her life, for the rule of law in this respect is *nemo est hæres viventis*. As no person then could become her heir during her life, it was altogether uncertain who might happen to be her heir at her death. . . . In *Moore v. Parker*, Skin. 559, ROLLE, Chief Justice, lays it down, "if a devise be to a man for life, and after to his heir, this is an estate in fee; but if it be to the heirs of such heir, such devise then is a contingent remainder;" the word "heirs" in this latter case being engrafted on the word "heir," renders it, as in the case at bar, a *designatio personæ*, or word of purchase, and makes it altogether uncertain, during the life of the first devisee, who the person may be that will answer to the description of his heir at his death, and hence the remainder limited to such heir is contingent, on account of the uncertainty of the person who is to take it. From the authorities, then, on this subject, as well as from the nature of the devise over in the case before us, it appears, with-

out any doubt, to be a contingent, and not a vested remainder, limited to the heir of the daughter for life.

NOTE. — The cases distinguishing between vested and contingent remainders are very numerous. It is submitted that they are properly to be distinguished by the following test: —

A future estate must, in the nature of things, await the determination of prior estates before it becomes an estate in possession. If the owner of the future estate is in being and ascertained, and is entitled to the possession of the land whenever the preceding estate or estates determine, his remainder is vested.

All other remainders are contingent. For example; if land is given to B for life, remainder to B's unborn son. Here the remainderman is not in existence. Or, if land is given to B for life, remainder for life to such person as may be the heir of B, as in the principal case. The person who will prove to be the heir may, or may not, be in being, but, in either case, is as yet unascertained. Or, if land is given to an ascertained person in being, but upon a condition, as where land is given to B for life, remainder to C, if C marries.

If land is given to B for life, remainder to C for life, and C is in being, C has a vested remainder. The possibility that C may die before B and therefore never enjoy the land is immaterial.

There are in some States statutes which lay down tests for distinguishing between vested and contingent remainders, which differ from the test set forth above.

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### BAILS v. DAVIS.

241 Ill. 536. 1909.

MR. JUSTICE DUNN delivered the opinion of the court:

A demurrer was sustained to a bill for partition filed in the circuit court of Macon County, the bill was dismissed for want of equity and the complainants have appealed.

The complainants deraign title from Jonas Nye. He conveyed the premises by a statutory quit-claim deed "to Joseph Kretzer and Mora Kretzer, his wife, during their natural lives and after their death to the heirs of said Joseph Kretzer." The Kretzers were afterward divorced and Mora Kretzer conveyed all interest in the premises to Joseph Kretzer, whose title by subsequent conveyances has become vested in the complainants. Joseph Kretzer has two sons, one of whom conveyed his interest in the premises to the other, who was made a party to the bill and filed the demurrer.

Appellants claim to be seized of the premises in fee simple. Whether they are so seized depends upon the question whether the

title conveyed by Jonas Nye to Joseph Kretzer was a fee or only a life estate. The language of the deed purports to convey the premises to the grantees during their joint lives and after their death to the heirs of Joseph Kretzer. Appellants claim that this deed is within the rule in *Shelley's Case* and conveyed a fee to Joseph Kretzer, subject only to the life estate of Mora Kretzer as a tenant in common of the premises, and that by the conveyance of her interest the whole estate vested in Joseph Kretzer. No brief has been filed on behalf of the appellees.

Under the rule in *Shelley's Case*, which is in force in this State, if an estate for life is granted by any instrument and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. The rule is one of the most firmly established rules of property and is unshaken in this State. In determining whether it is applicable in a given case the question does not turn upon the quantity of estate intended to be given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise. *Vangieson v. Henderson*, 150 Ill. 119; *Ward v. Buller*, 239 id. 462. When the heir takes in the character of heir he must take in the quality of heir, and all heirs taking as heirs must take by descent. *Baker v. Scott*, 62 Ill. 86. The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the first taker. The language of the deed clearly indicates the nature of the estate intended to be given to the heirs of Joseph Kretzer. He is given an estate for life with remainder in fee to his heirs as a class, without reference to individuals or any other condition. The estate thus given to the heirs by the operation of the rule vests in the life tenant.

The requisites of the rule are stated to be, first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate by the name of heirs as a class and without explanation, as meaning sons, children, etc.; third, the estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality, — that is, both legal or both equitable. *Baker v. Scott*, *supra*; *Ward v. Buller*, *supra*. All these requisites are present here, viz., a life estate to Joseph Kretzer and a remainder in fee simple to his heirs, — both legal estates created by one deed.

Two reasons suggest themselves which might be urged against the application of the rule: (1) The life estate is in one-half the property only, while the remainder is in the whole; (2) the life estate might be determined by the death of Mora Kretzer in the lifetime of Joseph, thus destroying the remainder by determining the particular estate before the happening of the contingency which would determine the

persons who would succeed to the remainder. Neither of these reasons, however, is a valid objection to the application of the rule. It is not a requisite that the estate given to the ancestor and that to the heirs shall be of the same quantity. *Ward v. Buller, supra*. The rule has no effect upon the estate given to the ancestor. It affects only the remainder given to the heirs and causes such remainder to vest in the ancestor and not in the heirs. If there is a merger in the ancestor, it follows, not as a necessary result of the operation of the rule, but from the operation of another independent rule of law in regard to separate estates which in any manner become vested in one person. In regard to the destruction of the supposed contingent remainder to the heirs of Joseph Kretzer who cannot be known in his lifetime, by the termination of the particular estate before his death, the rule that contingent remainders are destroyed which do not vest at or before the termination of the particular estate has no application. There is no contingency, because the remainder which is expressed to be to the heirs of Joseph Kretzer the law declares to be a remainder to Joseph Kretzer, the same as if it had been made expressly to him and his heirs.

Where there is a limitation to several for their lives with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given. *Fuller v. Chamier*, L. R. 2 Eq. 682; *Bullard v. Goffe*, 20 Pick. 252. The limitation to the heirs must be to the heirs of a person taking a particular estate of freehold, but if it is confined to such heirs then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not. *Watkins on Descent*, 162-164; *Fearne on Contingent Remainders* (4th ed.), 23-30; 1 *Preston on Estates*, 313-320; *Rogers v. Down*, 9 Mod. 292; *Merrill v. Rumsey*, 1 Keb. 688. *Fearne* states the rule as follows (p. 25): "Whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail, (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate,) there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor and does not remain in contingency or abeyance, with this distinction: that where such subsequent limitation is immediate it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession;

but where such limitation is mediate it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates."

The deed of Jonas Nye conveyed to Joseph Kretzer and Mora Kretzer an estate, as tenants in common, during their joint lives with a remainder in fee to Joseph Kretzer. The conveyance of Mora Kretzer to Joseph Kretzer vested the latter with the whole title.

The court erred in sustaining the demurrer to the bill, and the decree will be reversed and the cause remanded to the circuit court, with directions to overrule the demurrer.

*Reversed and remanded, with directions.*



## CHAPTER V.

### SEISIN AND DISSEISIN.

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#### COKE UPON LITTLETON, 17 b.

“*Seised*”; *seisitus*, cometh of the French word *seisin*, i.e., *possessio*, saving that in the common law, *seised* or *seisin* is properly applied to freehold, and *possessed* or *possessio* properly to goods and chattels; although sometime the one is used instead of the other.

NOTE. — In *Cochrane v. Moore*, L.R. 25 Q. B. D. 57, *supra*, FRY, L.J., said that in Bracton’s day the distinction between real and personal property had not yet grown up; that the distinction then recognized was between things corporeal and things incorporeal; and that the law recognized *seisin* as the common incident of all property in corporeal things.

Littleton spoke of a tenant for years as *seised*: “Also if a man letteth tenements for term of years, by force of which lease the lessee is *seised*.” § 567.

The word “*seisin*” came to be a word of art. A is properly said to be *seised* of Blackacre, if he has an estate of freehold therein, and is in actual possession. He may also properly be said to be *seised* if he has an estate of freehold therein, immediately expectant upon a term for years (or other term less than freehold), and the tenant of such term is in the actual possession. In either case, he is said to be *seised* in deed.

If a person having a freehold estate in possession died, and the estate descended to his heir, the heir was said to be *seised* in law, even before he entered, — provided that no one else had usurped the possession. Similarly, of a person having a freehold reversion or remainder (see Chapter IV, *supra*) who became entitled to the possession by the determination of a precedent particular estate of freehold.

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#### LITTLETON, TENURES, § 279.

AND note that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold.

1 ROLLE'S ABRIDGMENT, 659, pl. 5.

If a man has a house, and locks it, and departs, and another comes to the house, and takes the key of the door into his hand, and says that he claims the house to himself in fee, and without any entry into the house, this is a disseisin of the house.

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LEACH v. JAY.

L. R. 9 Ch. D. 42. 1878.

THIS was an appeal from a decision of the Master of the Rolls.

The statement of claim alleged as follows:—

Robert Roberts died in 1864 intestate as to his real estates, leaving Anne Roberts his sole heiress-at-law, and thereupon his real estates descended to and became vested in Anne Roberts as such heiress-at-law, and remained so vested, and she had seisin in law thereof at the time of her death.

The said R. Roberts was at the time of his death seised of certain freehold houses at Brighton, a freehold house at E., in the county of Surrey, then or late in the occupation of W., and two freehold houses at L., in the said county of Surrey, then or late in the occupation of E. and another.

Upon the death of R. Roberts, his widow, Mary Roberts, under colour of a pretended will of her husband in her favour, entered into possession of the said real estates, and retained possession of them until her death in 1869, whereupon her devisees, the defendants, entered into possession of them.

Anne Roberts died in 1871, having by her will, dated in 1870, after giving her residuary personal estate to the plaintiff, John Leach, devised as follows: "I also bequeath and devise to him" (the plaintiff) "all real estate (if any) of which I may die seised."

The defendants having refused to deliver up possession of the houses to the plaintiff, or to recognise his title thereto as Anne Roberts' devisee, he brought this action, claiming to have his title established, and to recover possession, with consequential relief.

The several defendants demurred to the statement of claim on the ground that Anne Roberts' will did not, under the circumstances alleged in the statement of claim, pass the property or any right of entry thereon to the plaintiff, or, in other words, that Anne Roberts was not seised of the property at the time of her death.

The Master of the Rolls allowed the demurrer, and from this decision the plaintiff appealed.

JAMES, L.J.:—I do not think we can differ from the Master of the Rolls in this case. This lady, for some reason or motive of her own,

or for no reason, chose to use one of the most technical words in our law. The word has acquired no other meaning than its technical meaning, it has never got into ordinary use; therefore we are not at liberty to attribute to it any other meaning merely because we suppose that the testatrix did not know the true meaning of the word. It has been argued in favour of the appellant that seisin now has lost its distinctive meaning, that all its consequences have long ceased to exist, and therefore that you cannot predicate of anything that a testator died seised of it in any other sense than that it was part of his real estate. I am of opinion that there are such things as seisin and disseisin still. Mr. Joshua Williams says in his late book on Seisin: "If a person wrongfully gets possession of the land of another he becomes wrongfully entitled to an estate in fee simple, and to no less estate in that land; thus, if a squatter wrongfully encloses a bit of waste land and builds a hut on it and lives there, he acquires an estate in fee simple by his own wrong in the land which he has enclosed. He is seised, and the owner of the waste is disseised. It is true that, until by length of time the Statute of Limitations shall have confirmed his title, he may be turned out by legal process. But as long as he remains he is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs. The rightful owner in the meantime has but a right of entry, a right in many respects equivalent to seisin; but he is not actually seised, for if one person is seised another person cannot be so." Upon the allegations in this statement of claim, it appears to me that Mary Roberts was in the position of the squatter in Mr. Williams' book, that she squatted on the land, and that she and her heirs acquired an estate in fee by wrong which in time might eventually be turned into a rightful estate. She was seised, and as no one can be seised and disseised at the same time, the testatrix was not at the time of her death seised of the land in question. The appeal must therefore be dismissed with costs.

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RANDOLPH v. DOSS.

4 Miss. 205. 1839.

HARTWELL VICK was seised of certain lands at the time of his death. His widow claimed dower therein. Vick's title to such lands was disputed.

MR. JUSTICE TROTTER. The proof is full and complete as to the possession of Hartwell Vick, during his coverture with Sylvia C. Doss, for several years before his death. This is sufficient to entitle the widow to dower as against all the world except those who may have the paramount title. For it is a well-settled rule, that the seisin

of the husband even for a moment will entitle the wife to dower against strangers and those claiming under him, even though his seisin be tortious. A tenant at will made a feoffment of the land and died; and the feoffee was estopped from denying the right of the wife of the feoffor to dower. And this principle is recognised in all the cases on this subject, both in England and this country.

NOTE. — Similarly, a husband may have curtesy in land of which his wife was a disseisor. *Coglan v. Pellens*, 48 N. J. L. 27, 32.

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DEVER v. HAGERTY.

169 N.Y. 481. 1902.

WERNER, J. The action is in ejectment. The premises are in the borough of Brooklyn in the greater city of New York. The plaintiff, as grantor, sues for the benefit of Caulkins, her grantee, under a deed given while the defendant Hagerty was in the adverse possession of the premises. A brief recital of the chronological history of the title will clearly define the decisive question in the case. Prior to 1886 the plaintiff, Maria A. Dever, was the owner of the premises in suit. On May 12th, 1886, the same were sold for arrears of taxes to the amount of \$675.00, under the provisions of chapter 114, Laws of 1883, relating to the then city of Brooklyn. The defendant Hagerty was the purchaser at said sale, and on July 11th, 1888, received a tax deed under which he went into possession of the premises on September 19th, 1888, and has ever since remained in possession. This deed was recorded on September 19th, 1888. On July 25th, 1895, while the defendant Hagerty was so in possession, the plaintiff, Dever, executed and delivered to Caulkins a deed of said premises, and this is the deed under which the plaintiff sues for the benefit of her grantee. This deed was recorded on August 23d, 1895. On January 20th, 1896, the plaintiff, Dever, executed and delivered to the defendant Hagerty a deed of the same premises, which was recorded on January 24th, 1896. The defendant Hagerty took this deed with the knowledge that a deed had previously been given to Caulkins.

The trial court based its decision for the plaintiff upon two grounds: *First*. That the tax deed to Hagerty was invalid on account of irregularities in the tax proceedings. *Second*. That the deed from Dever to Hagerty was null and void because the grantee had knowledge of the prior deed to Caulkins. The affirmance by the Appellate Division of the judgment entered upon this decision was founded wholly upon alleged irregularities in the tax proceedings which were relied upon to invalidate the tax deed given therein. Our view of this case obviates the necessity for inquiring into the regularity of the tax proceedings

or the validity of the tax deed. We think that when this action was commenced the defendant Hagerty had a title to these premises which was good as against the plaintiff and Caulkins, her grantee. When the latter received her deed Hagerty was in adverse possession of the premises under a claim of title founded upon the tax deed. The deed from the plaintiff to Caulkins was, therefore, absolutely void as against Hagerty. R. S. [9th ed.] vol. 2, p. 1813, sec. 147; *Livingston v. Proseus*, 2 Hill, 526; *Chamberlain v. Taylor*, 92 N.Y. 348; *Pearce v. Moore*, 114 N.Y. 259. The latter deed, although void as against Hagerty, was good as against the plaintiff, the grantor therein named, and, under the old common-law rule which has been retained in section 1501 of the Code of Civil Procedure, the right of entry which passed to Caulkins, the grantee, could be enforced in an action of ejectment brought in the name of her grantor. *Hamilton v. Wright*, 37 N.Y. 502. As has been intimated, we have inherited this form of procedure from the common law. It was based upon the theory that under a deed which was void as against a person in adverse possession, the title remained in the grantor, while the grantee took nothing more than a right of entry which was merely a chose in action. As the assignee of a chose in action could not sue upon it at common law, the courts created this method of permitting the assignee to sue in the name of his assignor. As applied to actions in ejectment it was simply allowing the grantee under a void deed to use his grantor's title for the purpose of getting possession of the land. With the adoption of the Code rule, requiring suits to be brought by the real party in interest and permitting assignees of choses of action to sue in their own names, the common-law rule was abolished except as to actions in ejectment, in which the rule still survives. Thus it is apparent that, if this action had been brought before the execution and delivery of the deed from the plaintiff to the defendant Hagerty, the plaintiff's first grantee, Caulkins, could have rested upon the title of her grantor, the plaintiff, and could have recovered unless the tax deed to the defendant Hagerty was regular and valid. But this action was not brought until after the delivery and recording of the deed from the plaintiff to the defendant Hagerty. What was the effect of this deed? The answer is obvious. As the deed from the plaintiff to Caulkins was void the title to the premises remained in the former. This title was, therefore, in the plaintiff when she subsequently executed and delivered the deed to Hagerty. That deed conveyed the plaintiff's title to the defendant Hagerty. Since Caulkins' right of entry depended upon the continuance of title in her grantor, the plaintiff, it is difficult to understand upon what theory it could be held that the plaintiff was entitled to recover in ejectment, when the defendant had that title and was in possession thereunder. Upon principle, it would seem so plain that the plaintiff is not entitled to recover that the citation of authorities would

seem to be superfluous. But the question is also settled by authority. In *Jackson ex dem. Lathrop v. Demont*, 9 Johns. 55, it was held that where a tenant in possession of land, claiming to hold adversely, received a deed or release of the premises from one of the lessors, such deed was effectual and a bar to the lessor who executed it. The chancellor, who wrote in that case, summarized it as follows: "Neither of the lessors of the plaintiff have, then, shown a right to recover. We cannot give effect to the deed to Nichols (grantee) because of the adverse possession existing at the time of the sale, and we cannot allow Lathrop (grantor) to recover in defiance of his own deed to Miller (subsequent grantee). To yield to the pretensions of either would be shaking established principles; and, though Nichols may, perhaps, have ground to complain of the act of Lathrop in conveying to Miller, instead of lending his name and assistance to recover the possession of the land for him, yet that consideration cannot affect this case. In the action of ejectment we must look steadily to the legal title." To the same effect are the cases of *Jackson ex dem. Bonnel v. Wheeler*, 10 Johns. 164; *Jackson ex dem. Bonnel v. Foster*, 12 Johns. 488; and *Jackson ex dem. Preston v. Smith*, 13 Johns. 406. The last of these cases is also authority for the rule, which has steadily been adhered to in this State, that a person in possession of land claiming title may purchase in an outstanding title to protect that possession.

The case at bar, reduced to its simplest elements, may, therefore, be re-stated thus: The plaintiff had title. She attempted to convey it to Caulkins, but failed because the deed was void by reason of defendant Hagerty's adverse possession under a claim of title. Then the plaintiff conveyed to Hagerty. This deed was good because, when it was made, the plaintiff had the title and Hagerty had the right to take it. As plaintiff had no title when this action was commenced she could not maintain an action on her own account; nor for the benefit of Caulkins because the latter's right of entry depended upon plaintiff's title. None of the essential facts being in dispute this situation cannot be changed upon another trial.

The judgment of the Appellate Division should, therefore, be reversed and complaint dismissed, with costs in all courts.

NOTE.—In *Campbell v. Point Street Iron Works*, 12 R.I. 452, it was held that a disseisee's right was not subject to execution.

The common law conceived that the disseisor acquired the fee simple, that the disseisee had a mere right to recover his estate in the land, and that this right was not assignable. There are important statutory changes in many jurisdictions.

CHAPTER VI.  
COMMON LAW METHODS OF CREATING, OR  
TRANSFERRING, ESTATES.

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COKE UPON LITTLETON, 48 a, b.

“LIVERY of seisin.” *Traditio*, or *deliberatio seisinæ*, is a solemnity, that the law requireth for the passing of a freehold of lands or tenements by delivery of seisin thereof.

And there be two kinds of livery of seisin, viz. a livery in deed, and a livery in law. A livery in deed is when the feoffor taketh the ring of the door, or turf or twig of the land, and delivereth the same upon the land to the feoffee in name of the land.

A seised of an house in fee, and being in the house, saith to B: I demise to you this house for term of my life; this is a good beginning to limit the estate, but here wanteth livery. A livery in deed may be done two manner of ways. By a solemn act and words; as by delivery of the ring or hasp of the door, or by a branch or twig of a tree, or by a turf of the land, and with these or like words, the feoffor and feoffee both holding the deed of feoffment, and the ring of the door, hasp, branch, twig, or turf, and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed, according to the form and effect of this deed. Or by words without any ceremony or act; as, the feoffor being at the house door, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed; *et sic de similibus*: or, Enter you into this house or land, and have and enjoy it according to the deed; or, Enter into the house or land, and God give you joy; or, I am content you shall enjoy this land according to the deed; or the like. For if words may amount to a livery within the view, much more it shall upon the land. But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a deed; but if he deliver the deed upon the land in name of seisin of all the lands contained in the deed, this is a good livery: and so are other books intended that treat hereof, that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of anything upon the land in name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good.

A livery in law is, when the feoffor saith to the feoffee, being in the view of the house or land: I give you yonder land to you and your heirs, and go enter into the same, and take possession thereof accordingly, and the feoffee doth accordingly in the life of the feoffor enter, this is a good feoffment. . . . But if either feoffor or the feoffee die before entry the livery is void. And livery within the view is good where there is no deed of feoffment.

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LITTLETON, TENURES, §§ 59, 60.

In a lease for years, by deed or without deed, there needs no livery of seisin to be made to the lessee but he may enter when he will by force of the same lease.

But if a man letteth lands or tenements by deed, or without deed, for term of years, the remainder over to another for life, or in tail, or in fee; in this case it behoveth, that the lessor maketh livery of seisin to the lessee for years, otherwise nothing passeth to them in the remainder, although that the lessee enter into the tenements. And if the termor in this case entereth before any livery of seisin made to him, then is the freehold, and also the reversion, in the lessor. But if he maketh livery of seisin to the lessee, then is the freehold, together with the fee to them in the remainder, according to the form of the grant and the will of the lessor.

NOTE. — If the ultimate remainder is in fee, the tenant of the present estate and the remainderman or remaindermen all hold of the grantor's lord.

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DOE v. COLE.

7 B. & C. 243. 1827.

PRIDEAUX had a freehold estate in Blackacre, the possession being in a tenant for years. He granted Blackacre to the plaintiffs, and the question was whether this grant, without livery of seisin, transferred his estate.

BAYLEY, J. It is laid down distinctly, in Co. Litt. 49 a, "that if a man be seised of two acres in fee, and letteth one of them for years, and intending to pass them both by feoffment, maketh a charter of feoffment, and maketh livery in the acre in possession in name of both, only the acre in possession passeth by the livery. Yet if the lessee attorn, the reversion of that acre shall pass by the deed and attornment." And Lord COKE afterwards says, "So it is if any man make a lease, and by deed grant the reversion in fee, here the freehold with attornment of the lessee by the deed doth pass, which is in lieu



of livery." Now that is an authority to shew, that where lands are in possession of a tenant, the reversioner may convey his interest by deed. All lands lie in livery or in grant: and they do not lie in livery where the party intending to convey cannot give immediate possession. Here Prideaux had the freehold in him, but the right of possession was in his tenant. He, therefore, had a reversion expectant on the determination of the term. Now a reversion, which is a vested right, lies in grant. There can be no doubt that this instrument has words fully sufficient to operate by way of grant. On the short ground, that where the right of possession is in a tenant for years, the right of the landlord is a reversion expectant on the determination of the tenancy, and lies in grant, and not in livery, I am of opinion that the reversion of the lands sought to be recovered passed by the deed.

HOLROYD, J. The passage cited from Co. Litt. 49 a, is decisive to shew that the reversion passed by this deed to the lessors of the plaintiff.

LITTLEDALE, J. If Prideaux had been in actual possession of these premises, and intended to have conveyed his interest to a stranger, he ought to have delivered seisin. But possession being in a tenant from year to year, Prideaux had only a reversion, and in order to convey that reversion to the tenant in possession, must have released his right; but the proper mode of passing a reversion to a stranger not in possession is by grant. Here Prideaux has granted the reversion by the deed in question to the lessors of the plaintiff, who are entitled to recover.

*Judgment for the plaintiff.*

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LITTLETON, TENURES, § 551.

ATTORNMENT is as if there be lord and tenant, and the lord will grant by his deed the services of his tenant to another for term of years, or for term of life, or in tail, or in fee, the tenant must attorn to the grantee in the life of the grantor, by force and virtue of the grant, or otherwise the grant is void. And attornment is no other in effect, but when the tenant hath heard of the grant made by his lord, that the same tenant do agree by word to the said grant, as to say to the grantee, I agree to the grant made to you, &c., or I am well content with the grant made to you: but the most common attornment is, to say, Sir, I attorn to you by force of the said grant, or I become your tenant, &c., or to deliver to the grantee a penny, or a halfpenny, or a farthing, by way of attornment.

NOTE. — The necessity for attornment has been generally abolished by statute.

In *Fisher v. Deering*, 60 Ill. 114, the court held that attornment was necessary, but this is now otherwise, by statute. *Barnes v. Northern Trust Co.*, 169 Ill. 112, 116.

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LITTLETON, TENURES, §§ 444, 445, 459.

RELEASES of all the right which men have in lands and tenements, etc., are commonly made in this form, or of this effect:

*Know all men by these presents, that I A. of B. have remised, released, and altogether from me and my heirs quit-claimed: or thus, for me and my heirs quit-claimed to C. of D. all the right, title, and claim which I have, or by any means may have, of and in one messuage with the appurtenances in F., &c. And it is to be understood, that these words, remissee, et quietum clamasse, are of the same effect as these words, relaxasse.*

Also, if a man letteth to another his land for term of years, if the lessor release to the lessee all his right, &c., before that the lessee had entered into the same land by force of the same lease, such release is void, for that the lessee had not possession in the land at the time of the release made, but only a right to have the same land by force of the lease. But if the lessee enter into the land, and hath possession of it by force of the said lease, then such release made to him by the feoffor, or by his heir, is sufficient to him by reason of the privity which by force of the lease is between them, &c.

NOTE. — A release must, by the common law, be under seal.

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BLACKSTONE, COMMENTARIES.

Book II, p. 326.

A surrender, *sursumredditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined, a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words: "hath surrendered, granted, and yielded up." The surrenderor must be in possession; and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin.

## COKE UPON LITTLETON, 217 a.

By the rule of law a livery of seisin must pass a present freehold to some person, and cannot give a freehold *in futuro*. . . . Therefore if a lease for years be made to begin at Michaelmas, the remainder over to another in fee, if the lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all it must take effect presently, and cannot expect.

NOTE. — If A, seised of a freehold future estate, purported to grant it to B, the grant to take effect *in futuro*, the grant, as such, was void. See *Roe v. Tranmer*, 2 Wils. 75, *infra*.

A term for years might be made to commence *in futuro*. *Barwick's Case*, 5 Co. 93 b.

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 PIBUS *v.* MITFORD.

1 Vent. 372, 378. 1674.

IF A gives land to B for life, remainder to A and the heirs male of his body, because a man cannot give to himself, the remainder is void, for a man cannot convey to himself by a conveyance at the common law.

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 FEARNE, CONTINGENT REMAINDERS, 307.

IF a lease be made to A for life, and after the death of A, and one day after, the land shall remain to B for life, this remainder to B is void, because it cannot take effect immediately upon the determination of the preceding estate. This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval, when there should be no tenant of the freehold, to do the services to the lord, or answer to stranger's *præcipes*; as well as to preserve an uninterrupted connection between the particular estate and the remainder, which, in the consideration of law, are but several parts of one whole estate.

NOTE. — The freehold reverts to the grantor. Since he cannot convey to himself he has the same estate as he had before he created the estate in A, and not merely a term for one day. And the seisin cannot shift from him to B at the end of the one day, without livery of seisin at that time.

RYAN *v.* MONAGHAN.

99 Tenn. 338. 1897.

JAMES MONAGHAN gave certain real estate to his wife, Margaret, for life, with remainder to the heirs of his son James P. Monaghan. The widow died before the son.

BEARD, J. This estate, thus devised to the "heirs of" the son, was a contingent remainder, and as this son was [at his mother's death] alive, and as *nemo est hæres viventis*, this remainder estate, not being able to take effect on the termination of the particular or supporting estate, fell to the ground.

NOTE. — A freehold contingent remainder is destroyed unless it vests at, or before, the determination of the prior freehold estates. At such determination, the seisin passes on to the owner of the first vested freehold remainder, or reverts. It is immaterial that later the event happens which would have turned the contingent remainder into a vested remainder.

A freehold contingent remainder, limited upon a term for years, is void *ab initio*. Thus of an estate to A for 50 years, remainder to the heirs of A. See *Goodright v. Cornish*, 1 Salk. 226.

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LITTLETON, TENURES, §§ 599, 611.

By the feoffment of tenant in tail, fee simple passeth by the same feoffment by force of the livery of seisin.

When tenant for life maketh a feoffment in fee, by such a feoffment the fee simple passeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee simple shall pass, and yet he had at the time of the feoffment made but an estate for term of years.

NOTE. — Cf. the cases in Chapter V, *supra*, showing that a stranger to the title might, by wrong, acquire the seisin.

A tortious conveyance by a tenant for life or for years forfeited his estate, and "he in the reversion or he in the remainder may enter." Littleton, Tenures, §§ 415, 416.

An estate created by a tortious conveyance by a tenant in tail could not be ended during the life of the tenant in tail, and, at his death, could be ended only by action, and not by entry. Littleton, Tenures, §§ 595, 596.

A tortious conveyance could be made by feoffment, fine or recovery, but not otherwise.

Tortious conveyances have been generally abolished, and the doctrine has no importance at the present time, except as it throws light on the doctrine of acquiring title by adverse possession.

## CHAPTER VII.

## RENTS.

## LITTLETON, TENURES, §§ 213-218.

THREE manner of rents there be, that is to say, rent service, rent charge, and rent seck. Rent service is where the tenant holdeth his land of his lord by fealty and certain rent, or by homage fealty and certain rent, or by other services and certain rent. And if rent service at any day, that it ought to be paid, be behind, the lord may distrain for that of common right.

And if a man will give lands or tenements to another in the tail, yielding to him certain rent by the year, he of common right may distrain for the rent behind, though that such gift was made without deed, because that such rent is rent service. In the same manner it is, if a lease be made to a man for life, or the life of another, rendering to the lessor certain rent, or for term of years rendering rent.

But in such case, where a man upon such a gift or lease will reserve to him a rent service, it behooveth, that the reversion of the lands and tenements be in the donor or lessor. For if a man will make a feoffment in fee, or will give lands in tail, the remainder over in fee simple, without deed, reserving to him a certain rent, this reservation is void, for that no reversion remains in the donor, and such tenant holds his land immediately of the lord, whom his donor held, &c.

And this is by force of the statute of *Quia emptiores terrarum*. For before that statute, if a man had made a feoffment in fee simple, by deed or without deed, yielding to him and to his heirs a certain rent, this was a rent service, and for this he might have distrained of common right; and if there were no reservation of any rent, nor of any service, yet the feoffee held of the feoffor by the same service, as the feoffor did hold over of his lord next paramount.

But if a man, by deed indented, at this day maketh such a gift in fee tail, the remainder over in fee; or a lease for life, the remainder over in fee; or a feoffment in fee; and by the same indenture he reserveth to him and to his heirs a certain rent, and that if the rent be behind, that it shall be lawful for him and his heirs to distrain, &c., such a rent is a rent charge; because such lands or tenements are charged with such distress by force of the writing only, and not of common right. And if such a man, upon a deed indented, reserve to him and to his heirs a certain rent, without any such clause put in

the deed, that he may distrain, then such rent is rent seck; for that he cannot come to have the rent, if it be denied, by way of distress; and if in this case he were never seised of the rent, he is without remedy, as shall be said hereafter.

Also, if a man seised of certain land grant, by a deed poll, or by indenture, a yearly rent to be issuing out of the same land, to another in fee, or in fee tail, or for term of life, &c., with a clause of distress, &c., then this is a rent charge; and if the grant be without clause of distress, then it is a rent seck. And note, that rent seck *idem est quod redditus siccus*; for that no distress is incident unto it.

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### CHALLONER v. ROBINSON.

[1908.] 1 Ch. 49.

THIS was an application for an interim injunction, which raised the question as to the right of the defendants, as the superior landlords of premises in King Street, St. James's, to whom arrears of rent were due, to levy distress upon certain pictures, the property of various artists, and in the possession of an under-lessee of part of the premises when the distress was put in.

COZENS-HARDY, M.R. The question on this appeal is as to the right of the defendants, the superior landlords of premises in King Street, St. James's, to whom large arrears of rent are due, to levy a distress upon certain pictures and works of art, the property of various artists, which were upon the premises when the distress was put in. By the common law a landlord is entitled to distrain upon goods upon the demised premises without reference to the ownership of the goods. This is the general rule, but it is subject to certain exceptions, which are as well established as the rule itself. Any man claiming the benefit of one of these exceptions must satisfy the court that his case falls within the exception. No considerations of hardship can avail the man whose goods are thus taken to satisfy a debt which he has not contracted to pay. The rights of the landlord are purely legal, and so are the exceptions. Now in the leading case of *Simpson v. Hartopp*, Willes, 512; 1 Sm. L. C. 11th ed. p. 437, decided in the year 1744, WILLES, C.J., laid down the exceptions with great accuracy, and the words used by him must be taken to define and limit the exceptions precisely. The only one material for this appeal is the second — namely, "things delivered to a person exercising a public trade, to be carried, wrought, worked up, or managed in the way of his trade or employ." In *Clarke v. Millwall Dock Co.*, 17 Q. B. D. 494, Lord HERSCHELL, dealing with this particular exception, said: "I am of opinion that we are limited in this case by the strict terms of the exception. It is very difficult to find any sound principle

upon which to explain the law of distress and to support the various decisions. No doubt the general law which enables a landlord to distrain the goods of a third person upon the tenant's premises is, as was said in argument, anomalous, and the exception in question is also anomalous. I think that we cannot go beyond the terms of the definition of the exception." That statement, which is in accordance with a long line of authorities, binds this court.

[The court after examining the facts held that the pictures could be distrained.]

NOTE. — See, *accord*, *Trieber v. Knabe*, 12 Md. 491. See also *American Warrant Co. v. Sinnemahoning Co.*, 205 Pa. 403.

The remedy of the landlord by distress has been affected both by judicial decisions and numerous statutes in this country. See *Taylor, Landlord and Tenant*, 9th ed., §§ 558, 559.

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### ENGLISH v. KEY.

39 Ala. 113. 1863.

THIS action was brought by R. M. Key against W. W. English; was founded on the defendant's promissory note for \$300, dated the 17th April, 1858, payable on the 1st January, 1859, to R. H. Jones or bearer, and assigned by said Jones to the plaintiff; and was commenced on the 21st June, 1860. The defendant pleaded the general issue, and failure of consideration; and issue was joined on those pleas. On the trial, as the bill of exceptions states, "the plaintiff read in evidence the note described in the complaint, and the defendant then offered in evidence the following statement of facts: One White recovered a judgment against Key on the 3d April, 1858. On the 9th April, 1858, an execution on said judgment was issued, and placed in the hands of the sheriff of Monroe. On the 15th April, 1858, Key rented the land to English; and on the 17th April, 1858, English gave the note sued on, for the rent of the land for the balance of the year. On the 5th July, 1858, the sheriff sold the land to one Bender, who claimed an immediate right of possession under his purchase, and agreed to let English remain in possession, as his tenant, for the remainder of the year; to which English voluntarily assented. English accounted to, and settled with Bender, for the rent after the 5th July. The land was not redeemed from Bender by Key until after the 1st January, 1859. The plaintiff admitted these facts to be true, but objected to the evidence as irrelevant and incompetent. The court sustained the objection, and excluded the evidence; to which the defendant excepted, and which he now assigns as error.

R. W. WALKER, J. The familiar rule, which prohibits the tenant

from denying the title of the landlord, in any proceeding instituted by the latter, for the recovery of rent, or of possession, must be taken with the qualification (now quite as well established as the principal rule), that the tenant may show that he has been, *bona fide*, evicted under a paramount title, or that, since the inception of the lease, the title of the landlord has been extinguished, or has passed from him, either by his own act, or by operation of law. *Randolph v. Carlton*, 8 Ala. 614; *Pope v. Harkins*, 16 Ala. 323; *Smith v. Mundy*, 18 Ala. 185; *Wolf v. Johnson*, 30 Miss. 513; *Ryers v. Farwell*, 9 Barb. 615; 1 Washb. Real Prop. 615.

Except where it is payable in advance, no claim for rent arises, until the lessee has enjoyed the premises the whole time for which the payment of a rent is stipulated to be made. Hence it follows, that if the tenant be evicted by a paramount title, pending the lease, and before the rent falls due, he will not be liable to his landlord for rent for the unexpired term during which he may have enjoyed the land. In conformity to the principle that an entire contract cannot be apportioned, there is, in such cases, no apportionment of rent in reference to the length of time of occupation. The enjoyment of the estate for the stipulated term is the consideration for the covenant to pay rent; and on the plain ground of equity, that the obligation to pay ceases when the consideration for it ceases, the eviction of the lessee by a paramount title works his discharge from the payment of any rent thereafter falling due. *Clum's Case*, 10 Coke's R. 128; *Salmon v. Smith*, 1 Wm. Saunders' R. 205 (n.); *Wood v. Partridge*, 11 Mass. 488; *Boardman v. Osborn*, 23 Pick. 295; *Morse v. Goddard*, 13 Metc. 177; *George v. Putney*, 4 Cush. 351; *Russell v. Fabyan*, 7 Foster (N. H.) 543; *Martin v. Martin*, 7 Md. 375; *Giles v. Comstock*, 4 Comstock, 275; *Smith's Landlord and Tenant*, 134; 3 Kent, 464; 1 Washb. R. P. 97, 337, 341; Greenl. Cruise, title 28, ch. 3, §§ 1 *et seq.*

By the ancient law, no grant of a reversion could be made without the consent of the tenant, expressed by his attornment to his new landlord. Co. Litt. 309 a, n. (1). In early times, the relation of lord and tenant was of a much more personal nature than it is at present; and it was thought reasonable that a tenant should not have a new landlord imposed upon him without his consent. The tenant, therefore, was able to prevent his lord from making a conveyance to any person, whom he did not choose to accept as landlord; for he could refuse to attorn to the purchaser, and without attornment the grant was invalid. The only means by which the landlord could convey his reversion without his tenant's concurrence, was by the expensive process of a *fine* levied in the court of common pleas. In process of time, when the rent paid by the tenant became the only service, of any benefit, received from him by the landlord, the doctrine was found inconvenient; and the necessity of attornment to the validity



of the grant of a reversion was accordingly abolished by a statute passed in the reign of Queen Anne, (4 and 5 Anne, ch. 16, § 9,) which also provided, that no tenant shall be prejudiced by payment of his rent to the grantor before notice of the grant. Wms. Real Prop. 203. Both of these provisions form part of the statute law of Alabama. Code, § 1298; also, § 2215.

Rent is incident to the reversion; and the lessor's transfer of the reversion, though without the tenant's attornment to the assignee, or any express mention of the rent, carries with it the rent falling due thereafter. The holder of the reversion may, indeed, sever the rent from the reversion; but, unless it is specially reserved, the rent follows the reversion as a part of the realty. With the exception of cases arising under the statute of 11 George II, (ch. 19, § 15,) which is confined to the case of a life-tenant lessor dying pending the lease, and the principle of which has been re-enacted in some of the States and adopted by the courts in others, (1 Washb. R. P. 98; 3 Kent, 471,) rent cannot be apportioned as to time. There is, therefore, no apportionment of the rent between the lessor and his assignee; but whoever owns the reversion at the time the rent falls due, is entitled to the entire sum then due; and a lessor who has parted with the reversion, without specially reserving the rent, cannot maintain an action against his lessee for rent falling due thereafter. *Burden v. Thayer*, 3 Metc. 76; *Van Wicklen v. Paulsen*, 14 Barb. 654; *Demarest v. Willard*, 8 Cowen, 206; *Martin v. Martin*, 7 Md. 368; *Peck v. Northrop*, 17 Conn. 217; *Breeding v. Taylor*, 13 B. Monr. 477; *Sampson v. Grimes*, 7 Blackf. 175; *Stout v. Kean*, 3 Harring. 82; *Birch v. Wright*, 1 Term R. 378; *Flinn v. Calow*, 1 M. & G. 589; 1 Washb. R. P. 337-839. The defense thus arising in favor of the lessee, against an action by the lessor for rent falling due after an assignment of the reversion, does not depend upon eviction or ouster by the assignee, but is complete without it. By the transfer of the reversion, and of the rent afterwards falling due as incident thereto, the lessor becomes bound to pay such rent to the assignee, and is discharged from liability therefor to the lessor. *George v. Putney*, 4 Cush. 351 (356); *Farley v. Thompson*, 15 Mass. 18; authorities *supra*.

The same principles apply, and the same results follow, in the case of a transfer of the reversion by judicial sale. In *Pope v. Harkins*, 16 Ala. 324, DARGAN, C.J., said: "If the premises are sold by execution against the landlord, the tenant may show this in bar of the landlord's action for rent; for the purchaser occupies the same relation to the landlord that a grantee by deed would." And the authorities are clear to the point, that a purchaser of the lessor's estate at execution sale is entitled to the rent falling due after the execution of the sheriff's deed. *Randolph v. Carlton*, 8 Ala.; *Bank of Pa. v. Wise*, 3 Watts, 394; *Martin v. Martin*, 7 Md. 368; *Wilson v. Delaplaine*, 3 Harring. 499; *Moore v. Turpin*, 1 Speers, 32; *Montague v. Gay*, 17

Mass. 439; *George v. Putney*, 4 Cush. 351 (356); *Buffum v. Deane*, 4 Gray, 485; 1 Washb. Real Prop. 333.

It is obvious, from what has been said, that the court erred in rejecting the evidence.

*Judgment reversed, and cause remanded.*

NOTE. — If the reversioner reserved a right of entry upon non-payment of the rent, and then transferred the reversion, and the rent fell in arrear, the assignee could not enter. Littleton, Tenures, § 347. Cf. *Rice v. Boston & Worcester R. R. Corp.*, 12 All. (Mass.) 141, *supra*. But this rule was changed by St. 32 Hen. VIII, c. 34, subdivision 5. (1540.)

A rent may be assigned without the reversion, and the assignee may sue in his own name for the rent accruing after the assignment. *Beal v. Boston Car Spring Co.*, 125 Mass. 157; *Moffatt v. Smith*, 4 N.Y. 126.

There are statutes in some States changing the common law rule that rent is not apportionable as to time.

"Rent in arrear is a chose in action and does not pass by a conveyance of the reversion." *Damren v. American Power Co.*, 91 Me. 334, 337.

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EHRMAN v. MAYER.

57 Md. 612. 1881.

MILLER, J. This appeal is from an order sustaining a demurrer to, and dismissing the bill of complaint, filed by the appellant against the appellees. The relief prayed for by the bill is that the defendants may be required either to convey to the complainant the naked fee held by them in a certain lot of ground in the City of Baltimore, or to execute to him a new lease thereof for ninety-nine years, renewable forever, subject to a merely nominal rent. The facts of the case so far as disclosed by the bill and accompanying exhibits are substantially as follows: —

In September, 1782, John Eager Howard executed a lease to John Hoos, of lot No. 649 in Howard's addition to Baltimore Town, for ninety-nine years, with the usual covenant for perpetual renewal, reserving a yearly rent of "fifteen pounds, nine shillings and fourpence, current money." This lot has a frontage on Howard Street of about one hundred and sixty-nine feet. In January, 1828, the executors of Howard, under a power contained in his will, sold and conveyed the reversion in this lot with the incident rent to John Hoffman, and on the 2nd of November, 1832, Hoffman conveyed the same to Lucretia Sears. Having thus become the owner of the rever-

sion in the entire lot, Mrs. Sears on the 3rd of November, 1832, *accepted a surrender* from one Eli Lilly, of his leasehold interest in a *large part* of the lot, consisting of about one hundred and twenty-two feet of its frontage, and on the same day she executed two leases for ninety-nine years, renewable forever, of the part so surrendered, one to Sommer and Smith for sixty feet, and the other to Lilly for sixty-two feet and six inches, reserving in each lease an annual rent of \$300. It does not appear, nor is it averred, that she ever made any disposition of her reversion in the *residue* of the lot, consisting of a frontage of about forty-six feet, which she had acquired under the deed from Hoffman. She died in 1845, and the defendants are the trustee and *cestuis que trust*, who hold the legal and equitable interest in her property under her will. In June, 1864, Ehrman, the complainant, purchased from Gardiner and Matthews their leasehold interest in a lot fronting twenty-two feet on Howard Street, *which is conceded to be part of the residue* of the lot above mentioned, not embraced in the two leases of November, 1832. The deed by which this interest was conveyed to Ehrman, recites that the grantors acquired their title under an assignment from one John Harman, executed in April, 1857, subject to a yearly rent of \$88, and they convey to Ehrman, subject to the same rent. No conveyance is produced showing how Harman acquired his title, nor is anything further stated in reference to the complainant's title. The bill, however, admits that the lot thus conveyed to the complainant forms part of the lot originally leased by Howard to Hoos, and from this admission, as well as what is stated in the several conveyances above referred to, it must be assumed that the complainant derives his title from Hoos, *the original lessee*, through *mesne* assignments and sub-leases. Such being the state of the case, the complainant, in his bill, avers and insists that he is in fact the owner of his lot in fee, and is entitled to a conveyance of the naked or technical paper title to the reversion therein held by the defendants, upon two grounds.

1st. That Mrs. Sears, by receiving and accepting a surrender of the leasehold interest in a *part of the lot*, in November, 1832, and granting new leases thereof, reserving new and increased rents, thereby *extinguished the whole original rent* reserved under the lease from Howard, and complainant's lot, therefore, by operation of law, became released and relieved from the payment of any part of that rent. . . .

*First.* To sustain the first position, the appellant's counsel insists that the rent reserved under our peculiar leases with covenants for perpetual renewal, is in the nature of a *rent charge*, which cannot be subdivided or apportioned. And where the party having the rent, purchases any portion of the land charged with its payment, the whole rent is thereby extinguished. But conceding this to be the case with respect to a *rent charge*, it is clearly not so, and never has been,

with respect to a *rent service*, but just the contrary. In Littleton's Tenures, sec. 222, the common law upon the subject is thus stated: "Also, if a man hath a *rent charge* to him and his heirs, issuing out of certain land, if he purchase any parcel of this to him and his heirs, all the rent charge is extinct, and the annuity also, because the rent charge cannot by such manner be apportioned; but if a man which hath a *rent service*, purchase parcel of the land, out of which the rent is issuing, *this shall not extinguish all but for the parcel*; for a rent service in such case may be *apportioned* according to the value of the land." And in his comments upon this section, Lord COKE says, that such rent services as were not within the Statute Quia Emptores, were apportionable at common law: "as if a man maketh a lease for life or years, reserving a rent, and the lessee *surrender part* to the lessor, the rent shall be apportioned; so if the lessor recovereth part of the land in an action of waste, or entereth for a forfeiture in part, the rent shall be apportioned." Coke Litt. 148 a. The reasons upon which this distinction rests, as given by Lord COKE and Chief Baron GILBERT, need not be stated at length. It is sufficient for our present purpose, that such distinction has in fact existed from the earliest period of the common law. By the same authority (Littleton, sec. 213) *rent service* is defined to be "where the tenant holdeth his land of his lord by fealty and *certain rent*, or by homage, fealty and *certain rent*, or by other services and *certain rent*;" and in Smith's concise and admirable lectures on the Law of Landlord and Tenant, (marginal page 90,) it is said that "every rent *reserved upon a lease* is a *rent service*, and is accompanied by that which is the incident of every rent service, namely, a right on the part of the lessor to distrain for it." In leases like the one now before us, as well as in other leases of land, the rent most commonly reserved, is the yearly payment of a certain sum of money. According, then, to the authorities referred to, (and none higher can be adduced,) if in such case, the lessee surrenders a part of the land to the lessor, the rent for the remainder is not extinguished, but apportioned. Woodfall's Land. & Ten. (10th Ed.) 361, 362. We hold, then, that *apportionment*, and not *extinguishment*, was the result of the conveyances of November, 1832, and that a proportionate part of the original rent reserved in the lease of 1782, remained fastened upon the *residue* of the lot not embraced in those deeds.

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NOTE.

Covenants to pay rent are considered in the topic of Covenants Running with the Land, *infra*.

## CHAPTER VIII.

### THE STATUTE OF USES.

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#### SECTION 1.

#### EFFECT OF THE STATUTE UPON THE METHODS OF CREATING, OR TRANSFERRING, ESTATES.

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#### STATUTE OF USES.

27 Hen. VIII, c. 10. 1536.

WHERE by the common laws of this realm, lands tenements and hereditaments be not devisable by testament, (2) nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bona fide*, without covin or fraud; (3) yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts; (4) and also by wills and testaments, sometime made by *nude parol* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scanty had any good memory or remembrance; (5) at which times they being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; (6) by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses, confidences and trusts, divers and many heirs have been unjustly at sundry times disinherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fits chivalier*, & *pur file marier*, (7) and scanty any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles and duties; (8) also men married have lost their tenancies by the curtesy, (9) women their dowers, (10) manifest perjuries by trial of such secret wills and uses have been committed; (11) the King's highness hath lost the profits and advantages of the lands of persons attainted, (12) and of the lands craftily put in feoffments to the uses of aliens born, (13) and also the profits of waste for a year and a day of lands of felons attainted, (14) and the

lords their escheats thereof; (15) and many other inconveniencies have happened, and daily do encrease among the King's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; (16) for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the King's highness, or any other his subjects of this realm, shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt, by reason of such trusts, uses or confidences: (17) it may please the King's most royal majesty, That it may be enacted by his Highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following; that is to say, That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politick, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politick, that have or hereafter shall have any such use, confidence or trust, in fee-simple, fee-tail, for term of life or for years, or otherwise, or any use, confidence or trust, in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; (19) and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements or hereditaments, to the use, confidence or trust of any such person or persons, or of any body politick, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before, in or to the use, confidence or trust that was in them.

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STATUTE OF ENROLMENTS.

27 Hen. VIII, c. 16. 1536.

BE it enacted by the authority of this present parliament, That from the last day of July, which shall be in the year of our Lord God

1536, no manors, lands, tenements or other hereditaments, shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed and inrolled in one of the King's courts of record at Westminster, (2) or else within the same county or counties where the same manors, lands or tenements, so bargained and sold, lie or be, before the *Custos Rotulorum* and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; (3) and the same inrollment to be had and made within six months next after the date of the same writings indented; (4) the same *Custos Rotulorum*, or justices of the peace and clerk, taking for the inrollment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ii. s. that is to say, xij. d. to the justices, and xij. d. to the clerk; (5) and for the inrollment of every such writing indented before them, wherein the land comprised exceeds the sum of xl. s. in the yearly value, v. s. that is to say, ii. s. vi. d. to the said justices, and ii. s. vi. d. to the said clerk for the inrolling of the same: (6) and that the clerk of the peace for the time being, within every such county, shall sufficiently inroll and ingross in parchment the same deeds or writings indented as is aforesaid; (7) and the rolls thereof at the end of every year shall deliver unto the said *Custos Rotulorum* of the same county for the time being, there to remain in the custody of the said *Custos Rotulorum* for the time being, amongst other records of every of the same counties where any such inrollment shall be so made, to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so inrolled.

II. Provided always, That this act, nor any thing therein contained, extend to any manner lands, tenements, or hereditaments, lying or being within any city, borough or town corporate within this realm, wherein the mayors, recorders, chamberlains, bailiffs or other officer or officers have authority, or have lawfully used to inroll any evidences, deeds, or other writings within their precinct or limits; any thing in this act contained to the contrary notwithstanding.

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### LUTWICH v. MITTON.

Cro. Jac. 604. 1620.

It was resolved by the two Chief Justices, MONTAGUE and HOBART, and by TANFIELD, Chief Baron, that upon a deed of bargain and sale for years of lands whereof he himself is in possession, and the

bargainee never entered; if afterwards the bargainors make a grant of the reversion (reciting this lease) expectant upon it to divers uses, that it is a good conveyance of the reversion; and the estate was executed and vested in the lessee for years by the statute; and was divided from the reversion, and not like to a lease for years at the common law: for in that case there is not any apparent lessee until he enters.

NOTE. — Prior to the passage of the Statute of Uses, the doctrine had become established in chancery that the legal ownership of land might be in one person, and the equitable ownership in another person. Thus, if A enfeoffed B and his heirs to the use of C and his heirs. In such case, C had no rights at law, but was, in equity, protected as a beneficiary.

If A (instead of enfeoffing B to the use of C) agreed, for a valuable consideration, to hold the land for the benefit of C, C was, in equity, protected as a beneficiary.

The Statute of Uses did not provide that all attempts to create uses should be void. It allowed the use to be created, but provided that, forthwith it was created, it should be converted into a corresponding legal right.

If, therefore, after the statute, A wished to convey his land to C, it was only necessary that A should put the use, or equitable right, in C, and the statute would, without more, convert this equitable right into the corresponding legal right. An equitable estate became a legal estate. Therefore the only question was: how shall the equitable estate in C be raised? And the equitable estate was raised in C, whenever A made a promise to hold the land for C (or, in any form, agreed that C should have the benefit of the land), which promise was enforceable in equity.

Such a promise was enforceable in equity if (1) the promisor received a consideration for his promise; or if (2) the promise were under seal, and the promise was made for the benefit of some one of the promisor's blood, or (by the better opinion) connected with him by marriage. In the first case, the promise was called a bargain and sale; in the second case, a covenant to stand seised.

In England the Statute of Enrolments applied to a bargain and sale of a freehold estate, but not to the bargain and sale of an estate less than freehold. If A wished to convey to C, he could make C a tenant for years, as in the principal case, under the operation of the statute, and could then, by a common-law release, release the reversion to C. C's term for years would merge into the reversion so released, and C would be seised in fee. This form of conveyance, called lease and release, obviated the necessity of the parties going to the land, and did not fall within the provisions of the Statute of Enrolments. It came to be the common form of conveyance in Eng-



land, and remained so, for upwards of two centuries, until statutory forms of conveyance were adopted in the nineteenth century.

In this country, the Statute of Enrolments was never considered to be in force. See *Giran v. Doe*, 7 Blackf. (Ind.) 210.

There has therefore been no obstacle to conveying land by a bargain and sale in fee.

In *Holland v. Rogers*, 33 Ark. 251, the court said (p. 255): "A simple bargain and sale of land, in writing, in words of the present, and without any more is a conveyance, operating under and by virtue of the Statute of Uses, always upon sufficient consideration. It was devised in England, as a common assurance, soon after the passage of the statute (see Blackst. Com. Book II, p. 338) and has become the most common mode of conveyance in the United States."

In *Nelson v. Davis*, 35 Ind. 474, the court said (p. 476): "This species of conveyance, says Blackstone, was introduced by the Statute of Uses. Before the passage of the statute, the title to real estate could not be transmitted simply by a deed of bargain and sale. Livery of seizin could not thus be dispensed with. It was the practice before the statute for a person seized of lands to bargain and sell them to another, in which case, if the consideration was sufficient to raise a use, the bargainor became immediately seized to the use of the bargainee. And since the passage of the statute, the use vested in the bargainee by a deed of bargain and sale is at once executed by the statute, and the legal title vested in the bargainee."

In *Chiles v. Conley's Heirs*, 2 Dana (Ky.) 21, the court said (p. 23): "The writing here alluded to is as follows:—

" 'For value received, I bargain and sell unto Arthur Conley, my whole right of improvement made by John Brown, and all the land as far as Thomas Miller's claim interferes with my claim. Given under my hand and seal, this 7th day of February, 1806.

'WILLIAM BRIDGES. (Seal.)

'Test. THOMAS BOYD, }  
JOHN ROBINSON.' }

"The literal import of this writing is that of an executed agreement, or a conveyance of the title which the vendor held. It contains all the essential requisites of a conveyance in fee simple. It is informal and unusually summary, when compared with the redundant, quaint and prolix system of modern conveyances by deed. But it is not more laconic or less comprehensive than the ancient Saxon deeds, and is almost as formal and elaborate as the antiquated charters of enfeoffment; and, indeed, its form and style are, in some respects, preferable to the repletion and repetitions which unnecessarily characterize and greatly deform modern deeds of conveyance. It is sealed, and signed, and attested properly; it shows a valuable consideration; it identifies the parties; describes the land, and acknowledges an absolute executed sale in fee of the vendor's right. These

constitute a deed of conveyance; and therefore, as this instrument contains no provision or intimation to the contrary, this court cannot, by any allowable process of interpretation, give to it any other character or effect than those of a deed of bargain and sale. Co. Lit. 7, a; 4 Kent's Com. 460-1."

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JACKSON v. ALEXANDER.

3 Johns. (N.Y.) 484. 1808.

THIS was an action of ejectment, for lot No. 68 in the town of Milton, in the county of Cayuga. The cause was tried before Mr. Justice SPENCER, at the Cayuga circuit, on the 1st July, 1808. On the trial, the plaintiff gave in evidence an exemplification of a patent, dated the 8th July, 1790, granting the lot in question to Joseph Brown, for his military services, and a writing executed by Brown, in the following words:

"For value received of Daniel Hudson & Co. I hereby make over and grant for myself, my heirs, and executors, unto the said Daniel Hudson & Co. his heirs and assigns, my right and claim on the public for 600 acres of land. Witness my hand and seal, this 7th day of May, 1784.

"JOSEPH BROWN. (L. s.)

"In presence of

"SOLOMON COURES,

"JOHN DOLSON."

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts; and it was agreed, that if the court should be of opinion, that the instrument in writing from Brown to Hudson, one of the lessors of the plaintiff, was a sufficient conveyance of the premises in question, then judgment was to be entered for the plaintiff, otherwise the verdict was to be set aside, and a non-suit entered.

KENT, Ch.J. I am of opinion that the deed from Brown to Hudson was sufficient to convey his interest in the premises.

I agree that the deed, if it operates at all, must operate as a bargain and sale under the Statute of Uses.

At the common law, a feoffment or lease was valid, without any consideration, in consequence of the fealty or homage which was incident to every such conveyance. The law raised a consideration out of the tenure itself. But after the Statute of Quia Emptores, 18 Ed., I., Perkins says, that a consideration became requisite even to the validity of a feoffment, as none could be implied, since, according to the statute, no feudal duty or service resulted to the immediate feoffor. (Perkins, sects. 528-537.) The general and the better opin-

ion is, that the notion of a consideration first came from the court of equity, where it was held necessary to raise a use; and when conveyances to uses were introduced, the courts of law adopted the same idea, and held that a consideration was requisite in a deed of bargain and sale. This new principle in the doctrine of assurances by deed, met, at first, with a very strong resistance from the ablest lawyers of the age. Plowden, in his argument in the case of *Sharlington v. Stroffen*, 1 Plowden, 308, 309, which arose upon a deed under the Statute of Uses, contended, with great force of reason and authority, that a deed, which was a solemn and deliberate act of the mind, did of itself import a consideration; that the will of the grantor was a sufficient consideration, and it never could be called a *nudum pactum*. Lord BACON, in his reading on the Statute of Uses, takes notice of this argument of Plowden, and gives it the weight of his sanction. "I would have one case showed," said he, "by men learned in the law, where there is a deed and yet there needs a consideration. As for *parole*, the law adjudgeth it too light to give an action without consideration; but a deed, even in law, imports a consideration, because of the deliberation and ceremony in the confection of it; and, therefore, in 8 Regiæ, it is solemnly argued that a deed should raise a use without any other consideration." Bacon's Works, v. 4, p. 167. But notwithstanding this strenuous opposition, the rule from chancery prevailed, and it has been long settled, that a consideration, expressed or proved, was necessary to give effect to a deed of bargain and sale. I am not going to attempt to surmount the series of cases on this subject, though I confess myself a convert to the argument of Plowden. I admit the rule that a consideration is necessary to a conveyance to uses, but I think that here is evidence of a consideration, appearing on the face of the deed before us, sufficient to conclude the grantor, and to give effect to it as a bargain and sale.

The rule requiring a consideration to raise a use, has become merely nominal, and a matter of form; for if a sum of money be mentioned, it is never an inquiry whether it was actually paid, and the smallest sum possible is sufficient; nay, it has been solemnly adjudged, that a pepper-corn was sufficient to raise a use. 2 Vent. 35. Since, then, the efficacy of the rule is so completely gone, we ought, in support of deeds, to construe the cases which have modified the rule, with the utmost liberality.

The deed in the present case states, that *for value received of the grantee, he doth grant*," &c. and can it now be permitted to the grantor to say there was no value received? *Value received* is equivalent to saying, money was received, or a chattel was received. It is an express averment, *ex vi termini*, of a *quid pro quo*.

[The learned chief justice held that the words were a sufficient recital of consideration to raise a use.]

The next point in the case is, whether the words "make over and

grant," be sufficient to convey Brown's interest in the land. The word *grant* has been held sufficient to pass lands by way of use. (2 Mod. 253. T. Raym. 48.) Though in its original meaning, the word applied only to a conveyance of incorporeal hereditaments, which could not pass by livery of seisin, yet in conveyances under the Statute of Uses, it is sufficient, if the granting words are competent to raise a use; for the statute then performs the task of the ancient livery of seisin.

My opinion on both points, accordingly, is, that the plaintiff is entitled to judgment.

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BOULD v. WYNSTON.

Cro. Jac. 168. 1607.

EJECTMENT. Upon a special verdict, the case was, That Sir Henry Wynston by indenture covenanted, in consideration of natural love and affection to William Wynston, his eldest son, to stand seised to the use of William Wynston for life, and after to the use of such a *feme* as he afterward should marry, for life, remainder to the first son of the said William Wynston in tail: afterward, the said William Wynston being unthrifty, and in Gloucester gaol, Sir Henry Wynston, to disturb the rising of the use to the *feme* whom afterwards he should marry, let that land to his younger son for a thousand years: afterwards William Wynston took to wife the jailor's daughter, and died without issue: and, Whether this lease were good against her? was the question.

But all the court resolved for the plaintiff, that this was a good use: for the consideration extends to the *feme* which should be, as if it had been in consideration of marriage: for the love and affection of the son extends as well to the *feme* of the son (who is *quasi* part of the son) as to the son himself: for that by intendment is good cause of the son's advancement.

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THOMPSON v. THOMPSON.

17 Ohio St. 649. 1867.

THE question was whether the instrument set forth below operated to convey the land therein described to McCalla Thompson.

The instrument was as follows: "This indenture, made and entered into this 28th day of September, 1850, between Robert Jones of Cynthiaana, Kentucky, of the one part, and McCalla Thompson of said Cynthiaana, Harrison County, Kentucky, of the second part,

witnesseth: That, whereas the said Thompson has heretofore intermarried with Sarah Jones, the daughter of said party of the first part, and for and in consideration of the premises and the natural love and affection which the party of the first part has and entertains for his said daughter and said Thompson, and for the purpose of advancing said Thompson in life, the party of the first part has bargained and sold, and by these presents doth bargain and sell, transfer, and convey to said McCalla Thompson all that certain lot or parcel of ground, with a three story brick house thereon, situated in the city of Cincinnati, State of Ohio (described).

"To have and to hold said property, with its appurtenances, rights, and privileges, unto said Thompson, his heirs and assigns, forever.

"In testimony of which I hereunto set my hand and seal this day and year above written.

"ROBERT JONES, [SEAL.]"

WHITE, J. Does the consideration of this deed constitute a *good* consideration in law? If it would have been sufficient to uphold a covenant to stand seized under the Statute of Uses, it is sufficient to uphold a deed executed in conformity to our law.

"Uses," says Sanders, "may be raised either upon a pecuniary consideration, or upon what is called a *good* consideration, which is that of blood or marriage. Whatever be the form of the conveyance creating and transferring a use upon the former consideration, it is a *bargain and sale*, and must be enrolled as such; but conveyances raising upon or by virtue of the latter, are termed *covenants to stand seized*, and they are not within the words of the Statute of Enrolments, nor within the policy of it; because the consideration of blood and marriage is of a public nature." "The consideration of this conveyance is the foundation of it." "Uses can only be raised upon a covenant to stand seized in consideration of blood or marriage." 2 Sand. on Uses and Tr. (side) 96, 97.

In Sheppard's Touchstone, 511, 512, it is said that if one "in consideration of nature, kindred, blood, or marriage, with one's self, or any of his blood, . . . covenant to stand seized to the use of himself, his wife, children, brothers, sisters, or cousins, or their wives, these are good considerations, and the uses and estates thereupon and thus raised and made are good."

The foregoing refers to existing relations among kindred, and to existing marriages with the kindred of the covenantor, and is not limited to marriages to be had on the faith of, or in consideration of the covenant. This is apparent from the context, and from the difference, the author remarks, that is to be observed between the case where the covenant is in consideration of a marriage "*to be had*," and the other cases.

Thus in Bacon's Abridgment, speaking of marriage as a consideration, it is said: "With respect to considerations of marriage: a man

may covenant to stand seized to the use of A, his wife, and the consideration that *she* is his wife, will raise a good estate to her, for this is a good consideration in law." "Likewise, a man may covenant to stand seized to the use of A, the wife of his brother, in consideration that *she* is the wife of his brother, and this shall raise a good estate to her; for the love which he bears toward his brother, extends in his right to his wife." 10 Bacon's Abr. (Bouvier's), title Uses and Tr. (E.) Cov. to Stand Seized, p. 142; 2 Comyn's Dig. Cov. (G. 3); 1 Spence's Eq. (side) 450.

Again, in Comyn's Digest (vol. 2, p. 277, tit. Cov. (G. 3), under the head, "upon what consideration" the covenant may be raised, it is said: "If, in consideration of affection to his brother, he covenants to stand seized to the use of his brother and his wife for their lives, this extends to the wife of his brother. So, in consideration of affection to his son, extends to the wife of his son."

Here the marriages were existing at the time of the creation of the estate; there was no relationship by blood from which *natural* love and affection could arise; but there was love and affection which was recognized as sufficient, arising from the marriage of the donees to the blood of the covenantor; in the first case, to the covenantor himself: in the second, to his brother and to his son.

That marriage as a consideration is not limited to contemplated marriages with the kindred of the covenantor, is clearly the view taken in *Bell v. Scammon*, 15 N.H. 382, 395, and in *Gale v. Coburn*, 18 Mich. 397, 401. In both cases the deeds were made to sons-in-law, and they were declared to operate as covenants to stand seized, though the daughters had died, but leaving issue of the marriage, before the deeds were made. In the latter case it was held that the deed could operate in no other way, and it was upheld by the court solely on the ground of the marriage and the consanguinity of the children of the covenantee to the covenantor.

[The court held that the instrument conveyed the land therein described to McCalla Thompson.]

NOTE. — See, *contra*, *Corwin v. Corwin*, 6 N.Y. 342.

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#### NOTE.

AFTER the passage of the Statute of Uses, the common law methods of conveyancing, mentioned in Chapter VI, *supra*, continued to be valid. But it was now necessary to guard against a resulting use.

Prior to the passage of the Statute, if A enfeoffed B and his heirs, and there was no consideration for the feoffment, and no declaration of the use, the doctrine of equity was that B held the land to the use of A. Bacon said (Statute of Uses, p. 22): "When feoffments were

made, and that it rested doubtful whether it were an use or a purchase, because purchases were things notorious, and uses were things secret, the chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the indentment towards the use, and put the proof upon the purchaser."

After the passage of the Statute, this rule remained in force. See *Armstrong v. Wolsey*, 2 Wils. 19. It followed that if A enfeoffed B and his heirs, the use resulted to A, and was forthwith converted into the legal estate.

A resulting use could be prevented by having a consideration paid for the conveyance, or by having a recital of consideration so paid, or by having a declaration of the use, as where A enfeoffed B and his heirs, to their own use.

If A conveyed a lesser estate than he had, the tenure prevented a resulting use. Thus, if A, tenant in fee simple, enfeoffed B for life.

It is also to be noted that the common law methods of conveying could be used in conjunction with the Statute. Thus if A enfeoffed B and his heirs to the use of C and his heirs. This was the familiar feoffment to uses. The use raised in C was now converted by the Statute into the corresponding legal estate.

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#### ROE v. TRANMER.

2 Wils. 75. 1757.

UPON the trial of this cause it appeared in evidence, that Thomas Kirby being seised in fee of the lands in question made and executed certain deeds of lease and release. The lease dated November 9, 1733, made between the said Thomas Kirby of the one part, and Chr. Kirby his brother of the other part, whereby it is witnessed that the said Thomas Kirby, in consideration of 5s. did grant, bargain and sell to the said Chr. Kirby, his executors, administrators and assigns, the lands in question; to have and to hold the same unto the said Chr. Kirby, his executors, administrators and assigns, from the day before the date thereof for the term of one year under a pepper corn rent, to the intent that by virtue of these presents, and by force of the statute for transferring uses into possession, he the said Christopher may be in the actual possession of all the premises, and be enabled to take and accept of a grant and release of the reversion and inheritance thereof to them and their heirs, to, for and upon such uses, intents and purposes, as in and by the said grant and release shall be directed or declared. In witness, etc. executed by Thomas Kirby.

The release dated November 10, 1733, made between Thomas Kirby of the one part, and Chr. Kirby his brother of the other part,

witnesseth that for the natural love he beareth towards his said brother, and for and in consideration of 100*l.* to the said Thomas Kirby paid by the said Chr. Kirby, he the said Thomas Kirby hath granted, released and confirmed, and by these presents doth grant, release and confirm unto the said Chr. Kirby in his actual possession thereof now being, by virtue of a bargain and sale for one whole year to him thereof made by the said Thomas Kirby, by indenture dated the day next before the day of the date hereof, and by force of the statute made for transferring of uses into possession, after the death of the said Thomas Kirby, all that one close, etc. (the premises without any words of limitation to the releasee;) To have and to hold the said premises unto the said Chr. Kirby and the heirs of his body lawfully begotten, and after their decease to John Wilkinson, eldest son of my well-beloved uncle John Wilkinson of North Dalton in the county of York, gentleman, to him and his heirs and assigns, and to the only proper use and behoof of him the said John Wilkinson the younger, his executors, administrators or assigns for ever, he the said John Wilkinson the younger paying or causing to be paid to the child or children of my well-beloved brother Stephen Kirby the sum of 200*l.* and for want of such child or children, then to the child or children of my well-beloved sister Jane Kirby, and for want of such issue, then to the younger children of my well-beloved uncle John Wilkinson of North Dalton aforesaid, and for want of such younger children, then the said estate abovementioned to be free from the payment of the abovenamed sum of 200*l.* Then the releasor covenants that he is lawfully seised in fee, and that he hath good right and full power to convey the premises to the said Chr. Kirby, and also that it may and shall be lawful to and for the said Chr. Kirby, or the said John Wilkinson the younger, from and after the death of him the said Thomas Kirby, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said messuage, lands and premises, with the appurtenances, not only without the lawful let, suit, etc., of him the said Thomas, but all others claiming under him, etc., free from all incumbrances. Then it is covenanted by all the parties, that all fines and recoveries and deeds of the premises levied, suffered or executed by the parties, or any of them, or by any other persons, shall be and enure to the use of the said Chr. Kirby and his heirs of his body lawfully begotten, and for want of such issue, then to the use of the said John Wilkinson junior, his heirs and assigns for ever, according to the true intent of these presents. In witness, etc. Executed by Thomas Kirby.

It further appeared in evidence, that Chr. Kirby on the 10th of November, 1733, paid to the said Thomas Kirby 20*l.* in money, and gave him his note for 80*l.* payable to the said Thomas Kirby, who signed a receipt on the backside of the said deed of release in these words, viz., Received the day and year within written of the within named Chr. Kirby the sum of one hundred pounds, being the full



consideration-money within mentioned to be paid to me. I say received by me Thomas Kirby. Witness M. J. S. T.

It further appeared in evidence that Chr. Kirby died without issue in 1740, and that John Wilkinson the lessor of the plaintiff is the same John Wilkinson named in the deed of release, but it did not appear that the said John Wilkinson had notice of the said deeds of lease and release until a short time before this ejectment was brought.

This being the case for the consideration of the court, the general question is, whether the lessor of the plaintiff has a title to recover upon the lease and release.

It has been argued at the bar three times, the first time by Serjeant Willes for the lessor of the plaintiff, and Serjeant Poole for the defendant, and the second and third times (because of a new judge) by Serjeant Hewit for the plaintiff, and Sir Samuel Prime, the King's first serjeant, for the defendant.

It was admitted by the serjeants who argued for the plaintiff, that the lease and release being made to convey to Chr. Kirby an estate in fee-tail to commence *in futuro*, viz. after the death of the releasor, cannot operate as a common law conveyance, or as a lease and release; but they insisted that the release should take effect as a deed of covenant to stand seised to uses, *ut res magis valeat quam pereat*; and cited a variety of cases to prove it had every requisite necessary to constitute such a deed of covenant to stand seised to uses, that is to say, 1. Here is a sufficient and proper consideration; 2. A deed; 3. The covenantor was seised in fee; 4. Here are apt words, for the word *grant* of itself is sufficient in such a deed; and 5. Here is a manifest and plain intent.

On the other side it was insisted for the defendants, 1. That it plainly appears to be the intent of the parties that this conveyance should be by a lease and release, and therefore shall not operate as a covenant to stand seised to uses. Co. Lit. 49 a. And as the release is admitted on all hands to be void for the reason above, nothing passes thereby to Wilkinson the lessor of the plaintiff. 2. It was objected for the defendant that Wilkinson is not a party to the deed. 3. That there was not a proper consideration of blood to raise an use to him. 4. That no estate at all passed by this deed to Christopher Kirby, out of which the estate *in futuro* could arise or come to Wilkinson the plaintiff's lessor.

After time taken to consider, the court were all of opinion that the release was void as a common law conveyance, it being to convey a freehold to commence *in futuro*, but that it should have the effect and operation of a covenant to stand seised to uses; and in Hilary term 31 Geo. 2, Lord Chief Justice WILLES gave the judgment of the whole court for the plaintiff.

WILLES, C. Justice. It is admitted and agreed on all hands that this deed is void as a release, because it is a grant of a freehold to

commence *in futuro*: and therefore the only question is, whether it shall take effect as a covenant to stand seised to uses; and we are all of opinion that it shall (my brother BATHURST, not being here, authorized me to say he is of the same opinion).

Many cases have been cited on both sides, some of which are very inconsistent with one another, and to mention them all, would rather tend to puzzle and confound, than to illustrate the matter in question; and therefore I shall only take notice of those things we think most material, and of some few cases nearest in point for our judgment.

It appears from the cases upon this head, in general, that the judges have been *astuti* to carry the intent of the parties into execution, and to give the most liberal and benign construction to deeds *ut res magis valeat quam pereat*. I rely much upon Sheppard's Touchstone of common assurances 82, 83 (which is a most excellent book), where he says, when the intent is apparent to pass the land one way or another, there it may be good either way.

By the word *intent*, is not meant the intent of the parties to pass the land by *this* or *that* particular kind of *deed*, or by any particular mode or form of conveyance, but an intent that the land shall pass at all events one way or other.

Lord HOBART (who was a very great man) in his Reports, fo. 277, says, "I exceedingly commend the judges that are curious and almost subtil, *astuti*, to invent reason and means to make acts according to the just *intent* of the parties, and to avoid wrong and injury, which by rigid rules might be wrought out of the act"; and my Lord HALE in the case of *Crossing* and *Scudamore*, 1 Vent. 141, cites and approves of this passage in HOBART.

Although formerly, according to some of the old cases, the mode of form of a conveyance was held material, yet in later times, where the intent appears that the land shall pass, it has been ruled otherwise; and certainly it is more considerable to make the *intent* good in passing the estate, if by any legal means it may be done, than by considering the *manner* of passing it, to disappoint the intent and principal thing, *which* was to pass the land. *Osman* and *Sheafe*, 371. Upon this ground we go.

We are all of opinion that in this case there is every thing necessary to make a good and effectual covenant to stand seised to uses. *First*, Here is a deed. *Secondly*, Here are apt words, the word *grant* alone would have been sufficient, but there are other words besides, which are material, *viz.*, A covenant that the grantor has power to grant, and a covenant that all fines, recoveries, etc., of these lands shall enure to the uses in the deed. *Thirdly*, The covenantor was seised in fee. *Fourthly*, Here appears a most plain *intent* that Wilkinson the lessor of the plaintiff should have the lands in case Chr. Kirby died without issue. And *lastly*, Here is a proper consideration

to raise an use to the lessor of the plaintiff, for the covenantor in the deed names him to be the eldest son of his well-beloved uncle; these are all the circumstances necessary to make a good deed of covenant to stand seised to uses.

NOTE. — See, *accord*, *Horton v. Sledge*, 29 Ala. 478, 497; *Rogers v. Sisters of Charity*, 97 Md. 550; *Thatcher v. Omans*, 3 Pick. (Mass.) 521 (followed in *Carr v. Richardson*, 157 Mass. 576); *Bank of the United States v. Housman*, 6 Paige (N.Y.) 526; *Foster v. Dennison*, 9 Ohio 121; *Eckman v. Eckman*, 68 Pa. 460.

## SECTION 2.

EFFECT OF THE STATUTE UPON THE LIMITATION OF  
FUTURE INTERESTS.

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FEARNE, CONTINGENT REMAINDERS, p. 274.

WHEN it is said that a subsequent estate limited on a condition is void, the rule must be understood only of estates limited in conveyances at common law. . . . Limitations of this nature may take effect by way of use, for a use may be limited to cease as to one person upon a future event, and to vest in another.

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WOODLIFF *v.* DRURY.

Cro. Elis. 439. 1595.

TRESPASS. After verdict, Coke, Attorney General, moved in arrest of judgment. The case upon the pleading was, That one made a feoffment; and it was declared by the indenture, that it should be to the use of himself and A, his *feme* that should be, after their marriage, and of the heirs of their bodies; and he took A to *feme*. Whether she should take by the limitation of this use, was the question. And he moved that she should not; for presently by this feoffment, the fee is in the *baron* by the possession, executed to the use which he had before the marriage, which cannot after the marriage be divided, and made an estate tail in him, for he had the fee in him until the marriage. But all the justices held, that although he be seised in fee in the mean time, as in truth he is, yet by the marriage the new use shall arise and vest. And judgment was given accordingly to the plaintiff. *Vide* Statute 27 Hen. 8, c. 10, for transferring uses into possession.

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NOTE.

In respect to the limitation of the use, that is to say, in respect to the creation and transfer of equitable estates, equity was not bound by the rules governing legal estates.

Thus equity permitted the use to be vested in one person, but, upon the happening of an event, to shift over to another person. A

enfeoffed B and his heirs to the use of C and his heirs, but, if C should die without issue living at the time of his death, then to the use of D and his heirs. When C died, without issue then living, C's estate was cut short, and an estate to D was substituted. In equity, the benefit of a condition could be given to a stranger.

Again. A enfeoffed B and his heirs to the use of C and his heirs, from and after the following Christmas. This was not objectionable as an attempt to create a freehold estate *in futuro*. The use resulted, or came back to A in fee (*cf.* the creation of a legal reversion in fee), but, at the following Christmas, without further act of the parties, A's equitable estate was cut short, and an estate to C was substituted.

Again. A enfeoffed B and his heirs to the use of C for life, and, one day after C's death, to the use of D and his heirs. The use was in C for life, resulting use in A in fee, and, one day after C's death, A's equitable estate was cut short, and an estate to D was substituted.

In the examples above put, the method of conveyancing was a feoffment to uses. But the same results could be obtained by raising uses by bargain and sale, or covenant to stand seised.

Now the Statute of Uses did not provide that all attempts to create uses should be void. It allowed the use to be created, but provided that, forthwith it was created, it should be converted into a corresponding legal right.

The liberality existing in equity, before the passage of the Statute, with respect to the limitation of future interests was therefore now carried over into the law.

But to this statement one qualification must be made. Suppose the use was given to A for life, and then to the children of A living at the death of the survivor of A and B. Here the limitation to the children might, by chance, have taken effect; in orderly succession, upon the determination of A's life estate. In other words, it might, by chance, have taken effect as a remainder, — following on after the preceding estate, and not cutting the preceding estate short. In such case, it was decided that the limitation must be construed as a remainder, and, being a remainder, must be subject to all the rules governing contingent remainders. Therefore if A died, B living, the remainder to the children was destroyed, for it was a contingent remainder in its inception and had not vested at or before the determination of the prior estate. See *Hole v. Escott*, 2 Keen 444.

SECTION 3.  
UNEXECUTED USES.

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TYRREL'S CASE.

Dyer, 155. 1557.

JANE TYRREL, widow, for the sum of four hundred pounds paid by G. Tyrrel her son and heir apparent, by indenture enrolled in chancery in the 4th year of E. 6, bargained, sold, gave, granted, covenanted, and concluded to the said G. Tyrrel all her manors, lands, tenements, &c., to have and to hold, &c., to the said G. T. and his heirs forever to the use of the said Jane during her life, without impeachment of waste; and immediately after her decease to the use of the said G. T., and the heirs of his body lawfully begotten, and in default of such issue, to the use of the heirs of the said Jane forever. *Quære* well whether the limitation of those uses upon the *habendum* are not void and impertinent, because an use cannot be springing, drawn, or reserved out of an use, as appears *prima facie*. And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the enrolment, &c. And this case has been doubted in the Common Pleas before now; *ideo quaere legem*. But all the judges of C. B. and Saunders, Chief Justice, thought that the limitation of uses above is void, &c., for suppose the Statute of Enrolments [cap. 16] had never been made, but only the Statute of Uses [cap. 10] in 27 H. 8, then the case could not be, because an use cannot be engendered of an use, &c.

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MATTHEWS v. WARD'S LESSEE.

10 Gill & J. (Md.) 443. 1839.

THIS was an action of ejectment, commenced on the 12th August, 1837, by Sarah Ward, Smith Boston and others, lessors of the plaintiff, against Henry Matthews, the tenant in possession, for a lot in the city of Annapolis. The defendant appeared and pleaded not guilty, and the parties agreed upon the following statement of facts:

It is admitted in this case, that at and prior to the 20th of October, 1817, Leonard Scott and Sarah Scott his wife were seized in fee simple of the lot and premises in the declaration in this action mentioned, and being so seized, that they executed, acknowledged and

delivered the following deed, which was recorded in due time among the land records of Anne Arundel County:—

This Indenture, made this twentieth day of October, in the year of our Lord one thousand eight hundred and seventeen, between Leonard Scott and Sarah Scott his wife, of the city of Annapolis, in Anne Arundel County and State of Maryland, of the one part, and Henry Price, of the city, county, and State aforesaid, of the other part, witnesseth, that the said Leonard Scott and Sarah Scott his wife, for and in consideration of the sum of five dollars to them in hand paid, the receipt whereof they do hereby acknowledge, have, and each of them hath given, granted, bargained and sold, and by these presents do, and each of them doth, give, grant, bargain and sell, unto the said Henry Price, his heirs and assigns, a part of a house and lot, piece or parcel of ground, situate, lying and being in the city of Annapolis, which was formerly occupied by Captain James West as a tavern, and described as follows: Beginning at a brick partition wall on Church Street, about midway the house, then, etc.; to have and to hold the said lot, piece or parcel of ground and premises above described, and the goods and chattels before mentioned, unto the said Henry Price, his heirs and assigns forever; in trust to and for the uses, intents and purposes, that is to say, in trust for the use of the said Leonard Scott and Sarah Scott his wife, for and during their joint natural lives, and the life of the survivor of them, and after the death of the said Leonard Scott and Sarah Scott his wife, in trust as therein provided.

ARCHER, J., delivered the opinion of the court. .

It is contended by the appellant that the deed from Scott and wife to Price is a deed of feoffment; and as such, the legal title of the property vested by the Statute of Uses in John Henry Scott in fee; that the remainder over as being too remote was void, and that upon the death of John Henry Scott without heirs, the property of course became liable to escheat.

If by the words of the deed and the intention of the parties we could construe this as a deed of feoffment, there would arise no objection to such a result, from an absence of evidence of livery of seizin. The ancient law on the subject of feoffments, which demanded livery of seizin to give them efficacy, we consider as having been abolished, and that *now*, enrollment takes the place of livery, and is equivalent to it. The act of 1766 provided for the enrollment of deeds of feoffment, as well as other deeds, and the act of 1715 declared that livery should not be necessary where the deed was enrolled. Anterior to the law of 1766, ch. 14, although the legislature had rendered livery of seizin unnecessary, *where the deed was enrolled, it omitted making any provision for the enrollment of deeds of feoffment* until 1766; hence it was decided by the General Court, in 1 Harr. & John. 527, that a deed executed in 1726 could not operate

as a deed of feoffment without proof of livery of seizin, or such length of possession as would give rise to a presumption of livery of seizin. *Vide Carroll v. Norwood*, 1 Harr. & John. 178.

Although since the act of 1766, ch. 14, which provided for the enrollment of deeds of feoffment and other conveyances, livery of seizin is not necessary to a deed of feoffment, yet whether this be a deed of feoffment or a deed of bargain and sale, is a question of construction, depending on the words of the instrument. There is no doubt but that it would be capable of transferring the estate, either as a feoffment, or a deed of bargain and sale — the operative words of each species of conveyance being used. But the question is not whether, if it cannot operate in one way, it shall in another; but whether the conveyance is in point of law a feoffment, or a bargain and sale.

By the usage and practice of the State, bargains and sales, as a mode of passing estates, have nearly superseded all other modes of conveyance, and we do not believe it was at all designed, in the execution of the deed under consideration, to deviate from this accustomed mode. Nothing could more unequivocally impress a distinctive character on the instrument, than the words which have been used: the terms "*bargained and sold*" follow the words "given and granted," and qualify the mode of the gift and grant, and show that it was by a bargain and sale; and it is said that the insertion of the words "bargain and sale," in conveyances by lease and release, were inserted among the operative words of this conveyance, that the lease might be treated as a bargain and sale, and not a lease at the common law. Cornish on Uses, 74. Other considerations might be adduced from the limitations of the deed, conducing to the same conclusion, that this is a deed of bargain and sale; but it is perhaps unnecessary to advert to them, as the above view strikes us as satisfactory.

If this be a deed of bargain and sale, as we think it is, then the use was executed in the bargainee, and the limitations to use are merely trusts in chancery, and the *cestuis que trust* are seized only of an equitable estate.

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#### WASHBURN, REAL PROPERTY.

Book II, p. 162.

It was held, that as a use was executed by uniting the seisin which was in one, with the use which was in another, as there could be no seisin, properly speaking, of a use; if there were a feoffment to A, to the use of B, to the use of C, the seisin in A passed to and was executed to the use in B. But as only a use was given to B, it was



held, that the seisin which the statute united to the use in B, did not pass from him to C, and it consequently left the seisin in B, as the legal owner. In order, however, to give effect to the second part of the limitation, equity came in and required B to hold the estate to the use of C, and called this a trust.

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DOE *v.* PASSINGHAM.

6 B. & C. 305. 1827.

LANDS were released to Sir Watkin Williams Wynne and Edward Lloyd, tenants for years in said land, "to have and to hold the said premises with their appurtenances, unto the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns; to the only proper use and behoof of them the said Sir Watkin Williams Wynne and Edward Lloyd, their heirs and assigns for ever, upon trust, nevertheless, and subject to the several uses, intents and purposes thereafter mentioned, that is to say, to the use of the said Gwin Lloyd and his heirs," etc. The question was whether the uses to Gwin Lloyd, etc., were executed.

HOLROYD, J. Upon the first perusal of the deed in question I had no doubt that the legal estate was vested in the trustees, having always understood that an use cannot be limited upon an use; and although I was struck by the ingenuity of the distinction pointed out by Mr. Taunton, yet upon further consideration it appears to me that his argument does not warrant it. The argument is, that as the trustees did not in the first instance take to the use of another, but of themselves, they were in by the common law, and not the statute; that the first use was, therefore, of no effect, and the case was to be considered as if the deed had merely contained the second limitation to uses. But that is not so, for although it be true that the trustees take the seisin by the common law, and not by the statute, yet they take that seisin to the use of themselves, and not to the use of another, in which case alone the use is executed by the statute. They are, therefore, seised in trust for another, and the legal estate remains in them.

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SYMSON *v.* TURNER.

1 Eq. Cas. Ab. 383, note. 1700.

BUT notwithstanding this statute there are . . . ways of creating an use or a trust, which still remains as at common law, and is a creature of the court of equity, and subject only to their control and

direction: Where lands are limited to trustees to receive and pay over the rents and profits to such and such persons; for here the lands must remain in them to answer these purposes.

NOTE. — In *Meacham v. Steele*, 93 Ill. 135, the court said (p. 145): "The mere fact that the *cestui que trust* has the entire beneficial interest in the trust estate is no test in determining whether the beneficial interest is a trust or a use. To hold so would be to abolish all distinction between a trust and an use. Where the conveyance imposes on the trustee active duties with respect to the trust estate, such as to sell and convert it into money, or to lease the same and collect the rents, issues and profits thereof, and pay them over to the beneficiary, it creates a trust which the statute does not execute. But, on the other hand, where the estate is conveyed to one person simply for the use of another, or to the intent that the latter shall have the rents, issues and profits thereof, the conveyance creates an use which the statute does execute, for in such cases the trustee has no duty to perform with respect to the estate conveyed."

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AYER v. RITTER.

29 S.C. 135. 1888.

THIS was an action by William H. Ayer against H. J. Ritter, for the recovery of the Campfield plantation, of which the defendant was in possession. The Circuit Judge ordered a non-suit, as the plaintiff, claiming under the will of his grandfather, Lewis M. Ayer, (stated in the opinion,) had produced no deed to himself from the executors, and therefore had no legal title. Plaintiff appealed.

MR. JUSTICE McIVER. This was an action to recover possession of real estate, in which the plaintiff claimed title under the will of the late Lewis M. Ayer. The clause of the will is as follows: "My son, Zacheus Ayer, has lived on my Campfield plantation for the last thirty years as my overseer on said plantation, with liberty to use the income of the property to support his family, and it is my wish that he be allowed to continue to do so as long as he thinks proper; that is to say, I give, devise, and bequeath to my executors herein-after named, my said Campfield plantation," together with sundry articles of personal property, including the slaves on the place, "in trust nevertheless that my said executors shall apply the income of the property above mentioned in this item, solely and exclusively to the support and maintenance of my said son Zacheus and his family during his natural life (said income not to be subject to his debts or contracts), and after his death, in further trust, to convey and deliver to William Henry Ayer (the eldest son of Zacheus) the said

Campfield plantation," together with one-sixth part of the slaves and all of the other personal property above mentioned, "to be the absolute property of the said William Henry Ayer, and to convey and deliver the remaining other five-sixths of the said slaves to the other five children of Zacheus, so as to divide them equally among said five children in fee simple."

The land in controversy is claimed as part of said Campfield plantation, and the plaintiff having failed to introduce any conveyance from the executors for the said land, the defendant moved for a nonsuit, upon the ground that the plaintiff had failed to introduce any evidence showing title in himself to the land in dispute. The motion was granted, and plaintiff appeals upon the grounds set out in the record, which need not be repeated here, as the only question raised by the appeal is whether a conveyance from the executors was necessary to invest the plaintiff with the legal title to the land in dispute; and this depends upon the inquiry whether, under the terms of the testator's will creating a trust in favor of the plaintiff, the legal title passed directly to the plaintiff by the operation of the statute of uses, rendering a conveyance from the executors unnecessary, or whether the legal title remained in the executors as trustees under the will.

This question has been considered by this court in several recent cases, and it has been uniformly held "that the statute will not execute the use as long as there is anything remaining for the trustee to do, which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the trust." *Bowen v. Humphreys*, 24 S.C. 452. Accordingly in that case it was held that where land is devised to trustees to divide the same equally and deliver possession to four children of testator, the legal title remained in the trustees until those duties were performed, and hence that they were the proper parties to bring an action for the recovery from a third person of the land so devised. In *Huckabee v. Newton*, 23 S.C. 291, land was conveyed to a trustee in trust to permit L. to enjoy the land during her natural life, without rendering rent or hire, and after her death that the said trustee would convey the land to her children then living, or to the children of such as might be dead, in equal shares; and it was held that this duty to convey rendered it necessary for the legal title to remain in the trustees, and hence the statute of uses did not apply. In *Bristow v. McCall*, 16 S.C. 545, a testator devised his real estate to trustees for the use and benefit of his son E. and his daughter D., with directions to divide the same equally between said E. and D., and permit each to enjoy his or her half in severalty during his or her natural life, and upon the death of either to divide the share of the one so dying among his or her children equally. *Held*, that the duties thus imposed upon the trustees rendered it necessary that the legal title should remain in them, and prevented the operation of the statute of uses. In all

these cases the rule above stated has been uniformly recognized and applied.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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RAMSAY v. MARSH.

2 McCord (S.C.) 252. 1822.

[ANOTHER] mode of creating a trust not executed by the statute is, where a term for years is granted to one to the use or in trust for another. The legal estate in such case will not be executed by the statute in the *cestui que use*. The reason assigned is, that no one can be said, according to technical rule, to be seized of a term — *seisin ex vi termini*, importing a freehold, and the words of the statute being — “where any person is seized to the use of another’s.”

NOTE. — This principle was applied in *Slevlin v. Brown*, 32 Mo. 176.

Of course, a use raised on a chattel or a chose in action is not executed.

BOOK VI.  
RIGHTS INCIDENT TO THE OWNERSHIP  
OF LAND, OR ESTATES THEREIN.

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CHAPTER I.  
THE LAND ITSELF.

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DOUGHERTY *v.* STEPP.

1 Devereux & Battle, Law (N.C.) 371. 1835.

THIS was an action of trespass *quare clausum fregit*, tried at Buncombe on the last circuit, before his Honor Judge MARTIN. The only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

RUFFIN, Chief Justice. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held, that if there be no adverse possession, the title makes the land the owner's *close*. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a wilful entry into the land of another, upon an unfounded claim of right, innocent, which one, who set up no title to the land, could not justify or

excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

PER CURIAM.

*Judgment reversed.*

NOTE. — In *Maye v. Tappan*, 23 Cal. 306, the court said (p. 307): "It appears that the plaintiffs and defendants are the owners of adjoining mining claims, which are worked by deep underground tunnels. The fact that the defendants mined over the dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed; but they contend that it was not done willfully or intentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface; and that they were led to work over the line, by the representations of one of the plaintiffs, as to its locality, in relation to the tunnel and the place they were working. On the trial, the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs, in this action, were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows, that the question whether the defendants acted willfully and maliciously, or ignorantly and innocently, in digging up and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a certain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiffs to recover damages, or the amount of the damages to which they may be entitled, is not affected by the fact that the trespass was not willful in its character."

With regard to the common-law right of the sovereign to gold and silver found in any mine, see *Attorney-General v. Morgan*, [1891] 1 Ch. 432; *Shoemaker v. U.S.*, 147 U.S. 282, 306; *Moore v. Smaw*, 17 Cal. 199, 219. Cf. U.S. Compiled Statutes, § 2319.

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### FOLEY v. WYETH.

2 All. (Mass.) 131. 1861.

MERRICK, J. The declaration alleges that the plaintiff was seised and possessed of the parcel of land described therein, together with a right of way, in common with other persons, in two passageways adjoining and appurtenant thereto; and that the defendant dug a

large and deep pit in her own land, whereby a considerable portion of his land caved in and was removed, and the said passageways were made useless and impassable.

Proof of the alleged excavation and injury to his land and passageways having been adduced by the plaintiff, the presiding judge ruled that this was sufficient to entitle him to maintain his action, and that for this purpose it was not incumbent on him to show also that the excavation was made by the defendant in a careless, negligent and unskilful manner.

This ruling was correct. If the owner of land makes an excavation in it so near to the adjoining land of another proprietor that the soil of the latter breaks away and falls into the pit, he is responsible for all the damage thereby occasioned. Few principles of the law can be traced to an earlier or to a more constant recognition, through a long series of uniform and consistent decisions, than this. It is distinctly stated in 2 Rol. Ab. 564. In *Gale & Whatley on Easements*, 215, it is said that "the right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to artificial pressure by means of buildings or otherwise." In the former case the right is not an easement, but is a right of property as being necessarily and naturally attached to the soil. *Ib.* 216. And in the recent case of *Humphries v. Brogden*, 12 Ad. & El. N.S. 739, where the law upon the subject appears to have been fully and carefully investigated and considered, it is affirmed that the right to lateral support from the adjoining soil is not like the support of one building upon another, supposed to be gained by grant, but is a right of property which passes with the soil, so that if the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the support of the other close the very instant when the conveyance is executed. "And this doctrine," said Lord CAMPBELL, C.J., after an examination of the authorities in which it is recognized, and by which it is sustained, "stands on natural justice, and is essential to the protection and enjoyment of property in the soil." The same principle is asserted by this court in the opinion given by PARKER, C.J. in the case of *Thurston v. Hancock*, 12 Mass. 220. The decision in the case of *Lasala v. Holbrook*, 4 Paige, 169, is to the same effect. *Radcliff v. Mayor, &c. of Brooklyn*, 4 Comst. 195; *Richardson v. Vermont Central Railroad*, 25 Vt. 465; *Solomon v. The Vintners' Company*, 4 Hurlst. & Norm. 585. It is a necessary consequence from this principle that, for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This does not depend upon negligence or unskilfulness, but upon the violation of a right of

property which has been invaded and disturbed. This unqualified rule is limited to injuries caused to the land itself, and does not afford relief for damages by the same means to artificial structures. For an injury to buildings, which is unavoidably incident to the depression or slide of the soil on which they stand, caused by the excavation of a pit on adjoining land, an action can only be maintained when a want of due care or skill, or positive negligence, has contributed to produce it.

The jury were therefore correctly advised that, if the defendant, by excavations in her own land, and by carrying away large quantities of earth and clay therefrom, caused the adjoining land to fall and sink into the pit which she had dug, she was liable for the injury done to the soil of the plaintiff; and that this action might be maintained to recover damages for the interruption and disturbance of his right of way in the passageways, as well as for depriving him, or lessening the value, of the use of the land to which they were appurtenant. But it was erroneous, in the absence of any proof of carelessness, negligence or unskilfulness in the execution of the work, to add that they might take into consideration as an element of damage for which compensation could be recovered, the fact that the foundation of his house had been made to crack and settle.

NOTE. — The doctrine that the defendant is liable for damage done to the land of the plaintiff in its natural condition, even though he excavated from a proper motive and with due care, has often been approved. See *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489, 498; *Gildersleeve v. Hammond*, 109 Mich. 431, 439; *Schultz v. Bower*, 57 Minn. 493; *Walters v. Hamilton*, 75 Mo. App. 237, 246; *McGuire v. Grant*, 1 Dutch. (N.J.) 356; *Sharpless v. Boldt*, 218 Pa. 372, 377; *Ulrick v. Dakota Co.*, 2 S.D. 285, 291; *Simon v. Nance*, 45 Tex. Civ. App. 480, 483; *Richardson v. Vermont R.R. Co.*, 25 Vt. 465, 471.

In *Brown v. Robins*, 4 H. & N. 186, the land of the plaintiff would have subsided even if it had been left in its natural condition. There was no evidence that the defendant had been negligent. The plaintiff was allowed to recover for the damage to the building, as well as for the damage to the soil. This decision was approved in *Wilms v. Jess*, 94 Ill. 464, 468 (a case of subjacent support), and in *Stearns v. Richmond*, 88 Va. 992, 996.

But in *Gilmore v. Driscoll*, 122 Mass. 199, the court refused to follow this doctrine, and held that the defendant was absolutely liable only for damage done to the soil of the plaintiff. Setting such limit to the absolute liability of the defendant has frequently been approved. See *Quincy v. Jones*, 76 Ill. 231, 234; *Moellering v. Evans*, 121 Ind. 195; *Winn v. Abeles*, 35 Kan. 85, 91; *Covington v. Geyler*, 93 Ky. 275; *Gildersleeve v. Hammond*, 109 Mich. 431, 436; *Obert v.*



*Dunn*, 140 Mo. 476; *McGuire v. Grant*, 1 Dutch. (N.J.) 356; *McGettigan v. Potts*, 149 Pa. 155; *Bailey v. Gray*, 53 S.C. 503.

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SCHULTZ v. BYERS.

53 N.J. L. 442. 1891.

THE plaintiffs, Helena Schultz and Valentine Schultz, were the owners of a lot of land in Bayonne, Hudson County, upon which there was a building erected on brick piers set from three feet to three feet and a half in the ground. The defendant, who owned the adjoining land, excavated to the depth of seven feet within three or four inches of the plaintiffs' building, and erected a house thereon. The excavation by the defendant, within the line of his own land, caused the building of the plaintiffs to sink, and it was weakened, cracked and injured.

There was judgment of non-suit, and exceptions, on which errors are assigned.

SCUDDER, J. The declaration is framed on the idea that the plaintiffs' land, dwelling house and building were entitled to support by the adjacent land of the defendant, and that by wrongfully digging away and removing such support the damage complained of was caused, whereby a right of action accrued. A demurrer was filed to this declaration, but it appears to have been waived, and the cause was tried on a plea of the general issue, and proofs. With this form of pleading, leaving the declaration unaltered, there is difficulty in holding the case in court to determine the exact cause of controversy between these parties. But as the court at the circuit heard and decided the cause as if the pleadings were amended to present the issue, and the question is important, it will be considered as it was there tried and decided.

It is almost unnecessary to say that the juxtaposition of lands gives no right of support to buildings erected thereon, unless conferred by grant, conveyance or statute. As this is a case of recent erection of the building alleged to have been injured, the question of prescription, or lapse of time sufficient to infer a grant or conveyance, does not arise, nor has such right ever been conceded in our courts. The principle of the lateral support of lands and buildings was settled in this state by the case of *McGuire v. Grant*, 1 Dutcher, 356 (1856). As to land in its natural condition there is a right to such support from the adjoining land; as to buildings on or near the boundary line, injured by excavating on the adjoining land, there is no right of action, in the absence of improper motive, or of carelessness in the execution of the work. This is the law as established by the cases prior to that decision; it has remained the unquestioned law in this

state since that time, and it has been confirmed by many cases since in other courts. Some of the most recent are very valuable for reference, notably *Gilmore v. Driscoll*, 122 Mass. 199; *Angus v. Dalton*, 6 Ch. App. Cas. 740, L. R. (3 Q. B. Div.) 85, where a most thorough examination of the subject will be found.

Although this law seems to give the owner of a building put upon his own land in a manner most advantageous and sometimes necessary to make it available for his use, especially in a closely built city, but little protection against the choice or caprice of another who may own the adjoining lands, yet it will be observed he is not entirely without protection. Neither can say, "It is lawful for me to do what I will with my own," as has been sometimes loosely stated in discussing this subject, and that it is a man's folly to build near the dividing line between his land and that of his neighbor, for it is more frequently his necessity that compels him to do so. The rights of the parties are equal, and are subject to modification by the conflicting right of each other.

Our statute relating to party walls (Rev., p. 809) shows that in some cases it has been thought necessary to fix authoritatively the mutual concessions and limitations in the rights of adjoining land-owners. This statute only applies where the excavation is more than eight feet in depth, while in this case the digging is but seven feet deep, but it is a recognition of the reciprocal right and duty which sometimes grow out of the mere vicinage of property. The maxim *sic utere tuo ut alienum non laedas* is often invoked in such cases, and is of very wide application. In this case the limitation of this principle is, that if the owner of adjoining land would dig down beside the foundation of his neighbor's house, he must exercise his right to do so not carelessly, but cautiously. There was no proof, or offer to prove, at the trial, that the defendant was negligent in digging his cellar, whereby the plaintiffs' house was caused to settle and the walls to crack, beyond the mere fact that this was the result. This result alone was not sufficient, for it may have been caused by defects in the plaintiffs' house. The special ground of complaint is, that it was done without the knowledge of the plaintiffs, and without notice to them, by which they might have been enabled to protect their property. It is argued that the defendant thereby took upon himself the whole risk of injury to the building. The question whether such omission to give notice, under the circumstances stated, is evidence of carelessness in the execution of the work is an important one, and it cannot be said to be definitely settled. The case most frequently cited in this country in favor of requiring such notice is *Lasala v. Holbrook*, 4 Paige, 169, 173 (1833). In this case Chancellor WALWORTH, while affirming the right of the owner of adjacent land to excavate for improvement on his own land, using ordinary care and skill, without incurring damages for injury to a building sup-

ported thereby, says: "From the recent English decisions it appears that the party who is about to endanger the building of his neighbor by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same." He cites *Peyton v. Mayor of London*, 9 Barn. & C. 725; s.c. 4 Man. & R. 625; *Walters v. Pfeil*, 1 Moo. & M. 362; *Massey v. Goyner*, 4 Car. & P. 161.

In *Peyton v. Mayor of London* it was held that the plaintiff could not recover, because the defendant had not given notice of his intention to pull down his supporting house, that not being alleged in the declaration as a cause of the injury. Lord TENTERDEN says, because of the failure to allege want of notice, the action cannot be maintained upon the want of such notice, supposing that, as a matter of law, the defendants were bound to give notice beforehand, upon which point of law we are not in this case called to give any opinion. In *Masey v. Goyner*, where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundation of a building, it was held he was only bound to use reasonable and ordinary care in the work, and not to secure the adjoining premises from injury.

In *Chadwick v. Trower*, 6 Bing. N. C. 1; s.c. 8 Scott, 1 (1839), it was decided, in the Exchequer Chamber, that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down a wall to give notice of his intention to the owner of an adjoining wall. This case was first considered in 3 Bing. N. C. 334, and cited in 2 Scott N. R. 74 and 5 *Id.* 119. In the argument, when it was urged that if it be a duty imposed on a party not to do work so incautiously as to injure his neighbor's rights, and it is clearly a want of proper caution to omit giving such notice as may enable the neighbor to take steps for his own security, PARKE, B., replied: "The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law." But if it be a duty affecting property rights, and the breach causes damage, it would seem that the law must afford a remedy.

In *Brown v. Windsor*, 1 Crompt. & J. 20, GARROW, B., said: "There may be cases where a man altering his own premises cannot support his neighbor's, and the support, if necessary, must be supplied elsewhere. In such case he must give notice, and then, if an injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take due precaution."

There are no later cases, that I have found, in the English courts, which change the rule given in *Chadwick v. Trower*, and that is therefore supposed to be the present law in England relating to this subject, though the cases above cited refer to support by adjoining buildings.

There are very few cases in our country which bear directly on

this point. *Shafer v. Wilson*, 44 Md. 268, is most frequently referred to, after *Lasala v. Holbrook*, above cited. It is there said, that notice to one's neighbor of an intention to make a contemplated improvement of property would seem to be a reasonable precaution in a populous city, where buildings are necessarily required to be contiguous to each other, and improvements made by one proprietor, however skillfully conducted, may be attended with disastrous results to his neighbors, who ought to have the opportunity to protect themselves and property. To the like effect is *Beard v. Murphy*, 37 Vt. 101.

Chancellor KENT, 3 Com. 437, has quoted the case of *Lasala v. Holbrook*, and this has been referred to in *Shafer v. Wilson*, and elsewhere. Washb. Easem. 434, 435; Shearm. & R. Negl. 497; 1 Thomp. Negl. 276, and other textbooks, cite these cases, and from such quotations it is impossible to determine how far the requirement of notice has passed into the general law of the courts in this country.

None of these cases are of binding authority in this court, and in a case of doubt, like this, we should seek for that result which is most reasonable and just. Where the danger of loss in doing a legal act is not equally balanced, we should lean to that side which most needs protection. Here a mere notice, which can cause but little trouble to one who is honestly exercising his right of excavating his land next to his neighbor's house, may enable the receiver of notice to shore or prop his walls to prevent its falling, or it may lead to some arrangement by which neither will be injured. It is more than a mere neighborly courtesy to give such notice, because it involves the right of one man to assert his right, regardless of the injury he may cause to his neighbor without such warning. The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or, if there be difficulty in finding or serving it on him, then it may be given to the tenant or occupant who is interested in protecting the property. Where it can be shown that such owner had knowledge of the improvement that was about to be made, it would not be necessary to prove a formal notice given to him.

In this view of the case, there was error in rejecting the evidence which was offered to show that the defendant gave no notice to the plaintiffs of his intention to excavate the land adjoining the house of the plaintiffs, and the judgment will be reversed.

NOTE. — MAGIE, J., delivered a dissenting opinion.

See, in accord with the decision, *Bonaparte v. Wiseman*, 89 Md. 12.

## AUSTIN v. HUDSON RIVER RAILROAD COMPANY.

25 N.Y. 334. 1862.

WRIGHT, J. The complaint alleges that the defendants, by their officers, agents and servants, undertook to enlarge and widen the cut in the Albany pier on the south side thereof, and so carelessly and negligently performed the work that, by and through such carelessness and negligence, the north wall of a building or warehouse of the plaintiffs on such pier was thrown down, and the building greatly injured and damaged, and the plaintiffs deprived of the use, occupation and income thereof. The fact of the defendants proceeding to enlarge and widen the cut is not denied in the answer, but they set up by way of avoidance that the work was not done under their immediate care, but by a contractor, under a special agreement that it should be done at a proper time and in a skillful manner; none of which facts were attempted to be proved on the trial. The proof showed that the work was done by the defendants' engineers and employees, under their direction, and not by a contractor under any special agreement.

The defendants, having obtained the consent of the pier company to widen the cut by excavating their own lots, might lawfully perform the work, and so long as the excavation did not extend beyond their own land, and was not negligently or unskillfully done, any injury to an adjacent proprietor would be *damnum absque injuria*. But if the work was negligently, unskillfully and improperly performed, and in consequence thereof the building of the plaintiffs was injured, they would be liable. *Dodd v. Holmes*, 1 Adol. & Ellis, 473; *Jones v. Bird*, 5 Barn. & Ald. 837; *Vaughan v. Mealon*, 32 Eng. Com. Law, 613; *Slingsby v. Barnard*, 1 Roll. 430; *Bellows v. Sacket*, 15 Barb. 96. The judge charged the jury that if the work of excavation was negligently conducted by the defendants, then they were liable for the injury, thus carrying out the principle enunciated, and which runs through the cases.

The question of negligence, or whether the excavation was made with ordinary care and skill, was submitted to the jury, the judge not being requested by the defendants to pass upon the question as matter of law from the evidence adduced by the plaintiffs. It is true, that one of the grounds urged for nonsuiting the plaintiffs was, that there was no proof to authorize a finding that the work on defendants' premises was done in a negligent or improper manner in respect to which an adjoining owner had any right to complain. But this did not meet the precise question whether there had been a want of ordinary care in the manner of performing the work, whereby injury had resulted to the owner of adjoining premises. But I think that the judge would have been justified in holding, as matter of law

upon the evidence, that ordinary care was not exercised, and because it was not, injury resulted to the plaintiffs' building; and if so, the defendants cannot complain that the question was given to the jury.

It is a general principle that, if the plaintiff's wrongful act or negligence concurs with that of the defendant in producing the injury, the law will not aid him in obtaining any redress. The principle admits of exceptions and qualifications, which it is unnecessary to state, as I do not think it reaches this case. No negligent conduct of the plaintiffs contributed to produce the injury. The aggressor, says the learned judge in *Bellows v. Sacket*, 15 Barb. 96, can never say that it was the duty of the assailed to ward off the blow aimed at him. The plaintiffs were the lessees of the pier lot adjoining those excavated and removed by the defendants, and had erected a building thereon. Through the negligence and want of care of the defendants in excavating their lots and widening the cut, the walls of their building cracked and fell. The defendants, in the fall of 1851, excavated and removed the earth from both of these lots, to within four feet of the north line of the plaintiffs' building, and drove piles in such a way as to crack the walls. The work was then suspended until the following spring, during which suspension the water by its action was washing away the earth at the north end of the plaintiffs' lot, and gradually undermining such lot. The attention of those engaged in the excavation was called to the action of the water, but nothing was done. There was no duty resting on the plaintiffs to protect their building. But if there had been, nothing could have been done short of erecting the end wall on the south side of the cut. The building could not have been propped up and saved from falling, when the fall was the result of its being partially undermined. It was not the case of a party who, having a duty to perform, neglects it, and "lies in wait" for damages.

I am clearly of the opinion that the defendants were liable for the injury. They undertook to excavate and remove their lots on the pier with the view of widening the cut on the south side. Whilst they kept upon their own premises, they were bound to ordinary care and skill in doing the work. If they negligently and improperly prosecuted and performed the work, and through such negligence and want of caution the plaintiffs' building was injured, they are liable to make compensation. The evidence tended strongly to show, and the jury have found on the question of negligence against the defendants.

NOTE. — In *Gildersleeve v. Hammond*, 109 Mich. 431, 435, the defendant was held liable for damage done to the buildings of the plaintiff through an excavation made by the defendant in a careless manner, and the court noticed that, on the facts, the plaintiff's land

would have fallen even if there had been no buildings upon it. But, it is submitted, the plaintiff is entitled to recover for damage to his buildings, where the defendant has been negligent, even though the plaintiff's land would not have fallen if there had been no buildings. See *Moody v. McClelland*, 39 Ala. 45; *Barnes v. Waterbury*, 82 Conn. 518; *Moellering v. Evans*, 121 Ind. 195; *Louisville R.R. Co. v. Bonhayo*, 94 Ky. 67; *Larson v. Metropolitan Ry. Co.*, 110 Mo. 234; *Hammond v. Schiff*, 100 N.C. 161; *Spohn v. Dives*, 174 Pa. 474.

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CEFFARELLI v. LANDINO.

82 Conn. 126. 1909.

ACTION to recover for work and labor and materials furnished in rebuilding the defendant's foundation wall and in shoring up his building adjoining the land upon which the plaintiff, a mason and contractor, was excavating preparatory to erecting a building for a third person, brought to and reserved by the Court of Common Pleas in New Haven County, WOLFE, J., upon an agreed statement of facts, for the advice of this court. *Judgment advised for the plaintiff.*

THAYER, J. The statement of facts shows that the defendant owns land on Hill Street in the city of New Haven, upon which there now is, and for many years prior to April, 1906, had been, a frame house, the southerly side of which, and of its underpinning wall, is twenty-two inches northerly of the southerly line of his land. The twenty-two-inch strip between the house and the southerly line of his lot was covered by an ordinary concrete walk. The lot of land on Hill Street south of the defendant's lot was owned by one Antonio Pepe. In April, 1906, the plaintiff, who is a contractor and builder, entered into a contract with Pepe to excavate for, and erect, a brick building upon his land, such excavation and building to extend to the southerly line of the defendant's land. The excavation was not intended to be carried more than ten feet below the curb line of Hill Street, and in fact was not carried to a greater depth than that. The defendant's building increased the lateral pressure upon said Pepe's land, and required lateral support from his land at least four feet below the surface thereof. Before the excavation was commenced, both the plaintiff and Pepe gave the defendant written notice that it was contemplated, and that he should shore up and protect his building. He neglected to do this. The plaintiff proceeded with the excavation, and as the support afforded by the Pepe land was removed, the twenty-two inches of the defendant's land which was covered with the concrete first crumbled away, and as the excavation progressed the wall of his building gave way and fell, and the

entire building was in danger of falling, and threatened serious danger to the plaintiff and his workmen. To protect the defendant's building and save it from destruction, and to render the work of excavating safe for the plaintiff and his men, he performed work and furnished brick, stone, planking, and other materials in building in part a new foundation under the building to support and protect it. Before this was done the building inspector of the city of New Haven had, in writing, ordered the defendant to protect said southerly wall of his building, and he having failed for more than twenty-four hours to comply with the order, the inspector had by written order directed the plaintiff to support and protect the building from falling.

In addition to these facts contained in the agreed statement, the court has found that during the work done by the plaintiff to support and protect the defendant's building the latter observed the work and directed the plaintiff to put a cellar window in a portion of the foundation wall rebuilt by him, and that the plaintiff did as thus directed, and that the value of the materials and services furnished by the plaintiff was \$290.

The complaint contains three counts. The first is founded upon the claimed right to recover at common law upon the foregoing facts. The second is based upon the claimed right to recover by force of the city ordinances hereinafter referred to. The third is the common counts, with a bill of particulars for work and materials. A demurrer to the first two counts was filed and *pro forma* overruled. An answer to each count was then filed and the case, at the request of the parties, has been reserved for the advice of this court as to what judgment shall be rendered.

It is unnecessary to consider the correctness of the rulings upon the demurrer. The facts as agreed upon are substantially those which are alleged in the complaint, and present the same questions which were raised by the demurrer. If, upon those facts, the plaintiff is entitled to recover upon either count, the defendant cannot now complain of rulings made upon his demurrer.

At common law the owner of land is entitled to have his soil in its natural condition supported by the adjoining land, but this right to lateral support does not extend to buildings or other superstructures placed upon the land. *Trowbridge v. True*, 52 Conn. 190; *Gilmore v. Driscoll*, 122 Mass. 199. The adjoining owner, therefore, if he excavates so near the line that his neighbor's soil, by reason of its own weight or the action of the elements, is liable to give way, must support it by artificial means, or answer in damages if it falls into the excavation. But if there are buildings upon the neighbor's land, these increase the lateral pressure, and if the giving way is due to this added burden, the person excavating is not liable, in the absence of negligence in conducting the work, for the damage so resulting to the owner. The hardship of this rule, especially in cities, is ap-



parent, and an attempt has been made in some of the States to establish a rule more favorable to an owner upon whose land buildings have been erected. In this State there is no such statute. At common law, therefore, it was not the plaintiff's duty to support or protect the defendant's building, and the latter, had he built the foundation and furnished the support which the plaintiff provided, could not have recovered for it in an action against him.

But he claims that he had acquired by prescription the right in the Pepe land to lateral support for the building, and that consequently the duty to protect it from the results of the excavation fell upon the plaintiff. Whether such right to lateral support for structures erected upon the soil of one lot can be acquired by prescription in the soil of an adjoining lot, is a question upon which the authorities differ. It is unnecessary to consider the question in the present case, because, if the right could be so acquired, the record does not show that the defendant's building had existed for such a length of time, or under such circumstances, as to justify the defendant's claim. It was not for the plaintiff to allege or prove that such a right had not been acquired by prescription, but for the defendant, if he claimed it, to establish that it had been.

The ordinances of the city of New Haven provide that whenever an excavation for building or other purposes shall be intended to be, or shall be, carried to a depth of more than ten feet below the street curb, the person causing the excavation shall, if afforded the necessary license to enter the adjoining land, at his own expense preserve any adjoining or contiguous wall from injury, but that when such excavation shall not be intended to be and shall not be carried to a depth of more than ten feet, the owner of such walls shall preserve the same from injury, and so support the same that they shall remain practically as safe as before the excavation was commenced. The ordinances also provide that if the person whose duty it shall be to protect such walls shall neglect or fail to do so after having had twenty-four hours' notice from the building inspector, the inspector may cause the work to be done at the expense of the party whose duty it was to do it. It appears that the inspector notified the defendant to protect the walls of his building, that the latter neglected and failed to do this for more than twenty-four hours, and that the inspector then directed the plaintiff to do it. The defendant contends that the plaintiff cannot recover except by force of these ordinances, and that these are invalid because unauthorized by the city charter and in violation of the constitution of the State.

We do not find it necessary to consider the defendant's claims as to the invalidity of the city ordinances, because we think that the plaintiff is entitled to recover upon the common counts for the work and materials named in the bill of particulars. The defendant not only knew that the plaintiff was furnishing these — which it was the

duty of the defendant to furnish — expecting to be paid therefor, but he also directed about the work. While it is not specifically found that all the work and materials were furnished upon request, such is the fair inference from the finding. The law implies therefrom a promise to pay for the same. The plaintiff is therefore entitled to recover upon the third count of the complaint.

Whether the plaintiff is liable to the defendant for causing the twenty-two inches of soil intervening between the excavation and his building to cave in we need not inquire. That question, and the question whether the excavation should have been sheet-piled, as claimed by the defendant, are not involved in the present proceeding. The record shows that the defendant's foundation gave way because of the increased burden imposed upon the Pepe land by the defendant's building, and the fact that there was a narrow strip of soil not covered by the building, adjoining the excavation, would not cast upon the plaintiff the duty of protecting the building.

The Court of Common Pleas is advised to render judgment for the plaintiff for \$290 with interest from January 1st, 1908, to the date of judgment.

Costs in this court will be taxed in favor of the plaintiff.

In this opinion the other judges concurred.

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### SMITH v. THACKERAH.

L. R. 1 C. P. 564. 1866.

DECLARATION that the plaintiff was possessed of certain land, and the land received lateral support from certain land adjoining thereto; and defendants dug and made on this adjoining land an excavation or well near to the land of the plaintiff, and the defendants thereby, and for want of keeping and continuing the sides of the well shored up, or otherwise preventing the consequences hereinafter mentioned, wrongfully deprived the land of the plaintiff of its support, whereby the land of the plaintiff sank and gave way, and divers walls, buildings, and premises of the plaintiff on the land sank and were damaged, whereby the plaintiff was put to great expense, etc.

Pleas, not guilty, and not possessed.

At the trial before ERLE, C.J., at the last Surrey spring assizes, it was proved that the plaintiff was possessed of a piece of land on which a building had been recently erected, and that the defendants, who were neighbouring landowners, dug a well on their own land near to that of the plaintiff, and afterwards filled up the well with such loose earth that the ground round it sank, and the plaintiff's building was injured, causing damage to the amount of 15*l*.

The jury found, in answer to questions by the Chief Justice, that the land of the plaintiff would have sunk if there had been no building on it, and that some particles of sand from it would have fallen on to the defendants' property, but that the plaintiff would have suffered no appreciable damage.

A verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for such sum under 15*l.* as the court should direct, on the ground that the facts proved at the trial entitled the plaintiff to a verdict without proof of any pecuniary damage.

ERLE, C.J. I am of opinion that this rule should be discharged. There is no doubt that a right of action accrues whenever a person interferes with his neighbour's rights, as, for example, by stepping on his land, or, as in the case of *Ashby v. White*, 1 Sm. L. C. 5th ed. 216, interfering with his right to vote, and this though no actual damage may result. But for a man to dig a hole in his own land is in itself a perfectly lawful act of ownership, and it only becomes a wrong if it injures his neighbour; and since it is the injury itself which gives rise to the right of action, there can be no right of action unless the damage is of an appreciable amount. A person may build a chimney in front of your drawing-room, and the smoke from it may annoy you, or he may carry on a trade next door to your house the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is in itself a lawful act. In the case of *St. Helen's Smelting Company v. Tipping*, 11 H. L. C. 642; 35 L. J. (Q.B.) 66, in which the defendant had set up some chemical works, the House of Lords held that, if the noxious vapours did not cause material damage to the plaintiff, he had no cause of action. In the present case the digging the well and filling it up again were in themselves perfectly lawful acts, and the jury have found that they did no sensible damage to the plaintiff, and he has therefore no right of action.

BYLES, J. I am of the same opinion. In actions for a trespass the trespass itself is a sufficient cause of action. But in actions for indirect injuries like the present, the judgment of the House of Lords in *Bonomi v. Backhouse*, 9 H. L. C. 503; 34 L. J. (Q.B.) 181, shews that there is no cause of action if there be no damage, and I cannot distinguish between no appreciable damage to the land in its natural state and no damage at all.

MONTAGUE SMITH, J. I am of the same opinion. The mere subsidence of the surface of the soil is not necessarily an injury, and we are bound by the verdict of the jury, who found that in fact no appreciable damage would have occurred if these new buildings had not been on the land.

*Rule discharged.*

NOTE. — The Statute of Limitations begins to run, in favor of the defendant, from the time when damage is suffered by the plaintiff,

not from the time when the excavation is made by the defendant.  
*Backhouse v. Bonomi*, 9 H. L. C. 503.

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BIRMINGHAM v. ALLEN.

L. R. 6 Ch. D. 284. 1877.

THIS was an action by the Corporation of Birmingham, who were the owners of gasworks called the Swan Village Gasworks, to restrain the defendants, T. H. Allen and T. E. Holden, who were proprietors of Swan Farm Colliery, in the neighbourhood of the gasworks, from working their coal in such a manner as to cause subsidence of the surface of the plaintiffs' land.

The plaintiffs purchased the gasworks from the Birmingham and Staffordshire Gaslight Company in the year 1875.

The gas company purchased the land on which the works were erected, together with the minerals under the same, in the year 1824. They afterwards purchased the minerals under various pieces of land adjoining their property, for the purpose of preventing the surface of their own land from being shaken or disturbed. Among others they purchased, in 1872, the minerals under a piece of land belonging to Messrs. Pershore & Gregory which adjoined the western boundary of the gasworks. The defendants' colliery lay to the west of this piece of land, to which it adjoined, so that the piece of land lay between the properties of the plaintiffs and the defendants.

The seams of coal under the district were as follows:—

The *Brooch Coal*, 3 ft. 9 in. thick, about 90 yards from the surface.

The *Thick Coal*, 28 ft. 9 in. thick, about 156 yards from the surface.

The *Heathen Coal*, 3 ft. 6 in. thick, about 156 yards from the surface.

The *New Mine Coal*, 5 ft. 6 in. thick, about 185 yards from the surface.

The *Thick Coal* under the piece of land purchased by the gas company in 1872 had been worked out more than thirty years before they purchased it, and the superincumbent earth was propped by pillars in the usual way.

The *Thick Coal* under the gasworks had not been worked out when the company purchased the site in 1824; but in the year 1834 they granted the *Thick Coal* under a small portion of the surface to Messrs. Bagnall & Haynes, who worked it out. Some of the area thus granted was exactly under the retorts of the gas company.

The defendants were now engaged in working the lowest vein, or *New Mine Coal*, under their land. They worked from west to east, and in doing so approached within a few yards of the western boundary of land purchased by the gas company in 1872.

The plaintiffs claimed that the working of the *New Mine Coal* by the defendants had already caused a subsidence of the surface of their land and the buildings thereon erected, and would, if persisted in, cause them great injury, and they brought this action for an injunction accordingly.

The defendants pleaded that if any subsidence of the plaintiffs' land had taken place, it had been caused partly by the excavations of *Thick Coal* under the plaintiffs' own land by the lessees of the gas company, and partly by the erection of buildings within the last twenty years over such excavated portions; and they denied that they were under any liability to the plaintiffs in respect of any injury they had sustained.

Both sides went into evidence at great length. The trial came on before the Master of the Rolls on the 15th of March, 1877, and witnesses were examined on both sides. The result of the evidence is stated in the judgment of the Master of the Rolls.

JESSEL, M.R. I am of opinion that the plaintiffs' case entirely fails. We have had a most careful and, I think, a most exhaustive investigation into the facts, and, as far as I am concerned, I have no doubt upon any of the facts necessary to be decided.

I think it is plain that if the land adjoining the plaintiffs' land had not been undermined, the defendants might work the *New Mine* seam as well as the *Thick Coal* seam up to their boundary. [His Lordship then referred to the evidence on this point.]

Now, looking to this evidence, and considering that it is for the plaintiffs to prove their case, I am of opinion that it is proved satisfactorily that, supposing the land between the plaintiffs' and the defendants' land had remained in its natural state, if the defendants' workings should be prosecuted up to the boundary of their property, they would not, as far as the *New Mine* is concerned, cause any injury whatever to the plaintiffs' works.

Then there is a second question, which is a question of fact I think I ought to give my opinion upon. Has the working of the defendants' *New Mine* at all actually injured the plaintiffs' buildings? I am clear it has not. [His Lordship then considered the evidence on this part of the case, and considered that there was no evidence of injury already received.]

Then comes the question, Will it occasion injury? As to that, the evidence is very conflicting. Mr. Cooksey puts the safe distance at 100 yards, and although there is a little variation, the plaintiffs' experts substantially agree in putting the safe distance at 100 yards, or fifty-five yards from the defendants' boundary. The defendants' four experts also substantially agree, and they put it at sixty yards, or fifteen yards from the defendants' boundary.

Here, again, it is for the plaintiffs to make out their case, and it seems to me to be mere surmise on both sides. However, I must say,

if it were necessary to decide the case on that ground, that it is not proved to my satisfaction that more than sixty yards is required, that is, more than fifteen yards from the boundary.

[His Lordship, after considering certain subordinate questions of fact, continued:]

I now come to a point of very great difficulty indeed, on which the evidence is in a very singular condition. The plaintiffs themselves, or their predecessors in title, had allowed a portion of their land to be undermined, that is, had allowed coal to be extracted from under that land, and the question was, whether the extraction of that coal in any way interfered with the support of the retort houses. Now the odd part of the matter is, that the experts for the plaintiffs said that it would interfere with the support, and increase subsidence; and the experts of the defendants said it would not. Under these circumstances, I think it is only fair to say that, as against the plaintiffs, they cannot reject the evidence of their own experts, and therefore I must consider that it does affect it to some extent, but, considering the evidence of the defendants' experts, not to a material extent. That is the way that matter appears to me.

Now, having so far dealt with the facts, let me consider the law. As I understand, the law was settled by the House of Lords, confirming the decision of the Court of Exchequer Chamber in the case of *Backhouse v. Bonomi*, 9 H. L. C. 503, that every landowner in the kingdom has a right to the support of his land in its natural state. It is not an easement: it is a right of property. That being so, if the plaintiffs' land had been in its natural state, no doubt the defendants must not do anything to let that land slip, or go down, or subside. If they were doing an act which it could be proved to me by satisfactory expert evidence would necessarily have that effect, I have no doubt this court would interfere by injunction on the ground upon which it always interferes, namely, to prevent irreparable damage when the damage is only threatened. Of course they must have a much clearer and much stronger case to call for the interference of this court by injunction where the damage is merely threatened and no damage has actually occurred, than when some damage has actually occurred, because in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by. If some damage has occurred it makes it manifest and certain that further damage will occur by reason of the prosecution of the works.

Now in this case, if it stands at all, it may well stand merely on opinion evidence, which would be sufficient ground for interference if all the experts agreed and the court were satisfied that damage had occurred; and I think when I compare the evidence of these various experts, I must take it for this purpose as proved that if the defendants work within fifteen yards of their boundary, and in

their *New Mine Coal*, damage, and serious damage, will accrue to plaintiffs' buildings. But the question I have to decide is whether in law that entitles them to an injunction. I think it does not. In this case it is true the plaintiffs or their predecessors acquired the mineral area, and acquired some of the land after the *Thick Coal* had been worked out and not before; but for the present purpose I lay out of consideration the fact of their ownership of anything, and I will treat the case as if the portions under which they possess the minerals, and the land so subsequently acquired, did not belong to them, and it appears as the result of the evidence that if that *Thick Coal* had not been extracted from under these portions of land, the intended operations of the defendants would certainly not cause any substantial injury.

But it is said that, inasmuch as these operations have occurred in what I will call the intervening land, and have thereby weakened the support, it will entitle the plaintiffs to prevent the owners of the land on the other side of this intervening land from working their mines in the way they could otherwise have worked them. But the first question one asks is, Why? Why should the act of the intervening owner, that is, the owner of the intermediate land, deprive men of their rights to their mines? It strikes one at once as a most extraordinary proposition. The act of the intervening owner for this purpose is rightful as regards the mine-owners whose mines are asked to be confiscated, for that is what it comes to. If they cannot work them they are confiscated. The plaintiffs ask for the confiscation of their property, not because they have done any wrong, for they have done no wrong — not because the intervening owner has done any wrong, for he only worked his mines, and when he worked them he occasioned no injury to the person who owned the property on the other side; but it is said that inasmuch as he has taken out his coal first, the defendants are deprived of the right of getting their mines. I say it is a startling proposition, and one which appears to me so unfounded in reason that I should be very loth indeed to believe it was founded in law.

Now, what is the right of the adjoining owner? As I said before, it is to the support of his land in its natural state — support by whom? The judges have said, "Support by his neighbour." What does that mean? Who is his neighbour? It was contended that all the landowners in England, however distant, were neighbours for this purpose if their operations in any remote degree injured the land. But surely that cannot be the meaning of it. The neighbouring landowner to me for this purpose must be the owner of that portion of land, whether a wider or narrower strip of land, the existence of which in its natural state is necessary for the support of my land. As long as that land remains in its natural state, and it supports my land, I have no rights beyond it, and therefore it seems to me that he is

my neighbour for this purpose. There might be land of so solid a character, consisting of solid stone, that a foot of it would be enough to support the land. There might be other land so friable and of such an unsolid character that you would want a quarter of a mile of it. But whatever it is, as long as you have got enough land on your boundary, which left untouched will support your land, you have got your neighbour's land whose support you are entitled to. Beyond that it would appear to me you have no rights.

Well, that being so, it is clear upon the evidence that the intervening portions of land between the boundary of the plaintiffs' and the boundary of the defendants' land was sufficient in its natural state for the support of the plaintiffs' building. Therefore it appears to me that the plaintiffs have no rights as against the landowners on the other side of that intervening space, and that they acquire no rights whatever the owner of the intervening land may have done; and, if the act of the intervening owner has been such as to take away the support to which the first landowner who complains is entitled, then, for whatever damage occurs from the act which he has done, the first owner may have an action, but an action against the intervening owner, not an action against the owner on the other side; and it appears to me that it would be really a most extraordinary result that the man upon whom no responsibility whatever originally rested, who was under no liability whatever to support the plaintiffs' land, should have that liability thrown upon him without any default of his own, without any misconduct or any misfeasance on his part. I cannot believe that any such law exists or ever will exist. It appears to me, therefore, that the plaintiffs are not entitled to damages for the acts of the defendants, and that the only order I ought to make is to dismiss the action with costs.

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### HENNESSY v. CARMODY.

50 N.J. Eq. 616. 1892.

PITNEY, V.C. The object of the bill is to restrain a private nuisance.

The complainant is the owner of a small lot of land, about eighteen feet front and rear by about ninety-six feet deep, in the city of Camden, fronting on the west side of South Eighth Street, about midway between Spruce Street on the north and Cherry Street on the south. Upon this lot is situate a small dwelling-house, composed of a main or front part of brick about fifteen feet front by thirty feet deep, two stories high, leaving a passageway of three feet on the northerly side, and having a wooden extension or kitchen, about ten by thirty-five feet, two stories high, in the rear. The rear of this



structure is thirty-one and a half feet from the rear line of the lot. The ground lying to the north and west of this lot is owned by the defendants, or one of them, and is used for a dye-works for coloring cotton and other materials. In the process of dyeing it, of course, becomes necessary to dry those materials, and in order to hasten this process use is made of two machines, called in the evidence "whizzers," into which the wet material is placed, and which, by being revolved at great speed, drive out the water by centrifugal force. These machines are driven by two small engines attached to them directly, without intermediate gearing, so that the engines must make the same number of revolutions as do the whizzers, and the more rapid the revolution, the more rapid the process of drying. The principal subject of litigation was as to the effect upon the complainant's premises of these machines.

[The discussion of the evidence is here omitted.]

The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court.

Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either, and as men are social beings, and by common consent congregate and need fires to make them comfortable and to cook their food, it follows that we cannot expect to be able to breathe air entirely free from contamination, or that our ears shall not be invaded by unwelcome sounds. Thus, my neighbor may breathe upon my land from his, and the smoke from his house fire and the vapor from his kitchen may come on to my land, or he may converse in audible tones while standing near the dividing line, and all without giving me any right to complain. So my neighbor and I may build our houses on the line between our properties, or have a party wall in common, so that we are each liable to hear and be more or less disturbed by the noise of each other's family, and cannot complain of it. In all these matters of the use of the common element — air — we give and take something of injury and annoyance, and it is not easy to draw the line between reasonable and unreasonable use in such cases, affecting, as they do, mainly the comfort and in a small degree only the health of mankind. In attempting to draw this line we must take into consideration the character which has been impressed upon the neighborhood by what may be called the common consent of its inhabitants.

But when we come to deal with what is individual property, in which the owner has an exclusive right, the case is different. While

my neighbor may stand by my fence on his own lot and breathe across it over my land, and may permit the smoke and smell of his kitchen to pass over it, and may talk, laugh and sing or cry, so that his conversation and hilarity or grief is heard in my yard, he has no right to shake my fence ever so little, or to throw sand, earth or water upon my land in ever so small a quantity. To do so is an invasion of property and a trespass, and to continue to do so constitutes a nuisance. And if he may not shake my fence or my house by force directed immediately against them, I know of no principle by which he may be entitled to do it by indirect means.

I think the distinction between the two classes of injury is clear. At the same time it would seem that it has, in appearance at least, been frequently overlooked by able and careful judges, and the same rules as to the degree of the injury which will justify judicial interference applied to each class.

The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court.

The injury, to be actionable, must be sensible and appreciable, as distinguished from one merely fanciful, and in a case like this I assume, for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes on the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable; while smoke and noise might have a similar effect in rendering the house less desirable without being actionable, because the degree of discomfort would not be sufficiently great to reach the standard — if, indeed, any standard has been established — applied to that class of injuries.

NOTE. — In *Scott v. Firth*, 4 Fost. & Fin. 349, BLACKBURN, J., said, in summing up to the jury: "The question is, whether this is a case of nuisance, that is, of actionable wrong? If the defendant, in the course of using these hammers, produced, not merely a nominal, but such a sensible and real damage as a sensible person occupying the cottage would find injurious, that is a nuisance; but that which is a sensible and real inconvenience to property situate in one place, or occupied in one way, will be none to property situate in another place or occupied in another way. If you are of opinion that the vibration caused by the hammers has shaken and cracked the walls of the cottages, you will probably consider that to be a substantial and real mischief."

## CHAPTER II.

## AIR.

## COKE UPON LITTLETON, 4a.

THE earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum ejus est usque ad cælum*.

## CORBETT v. HILL.

L. R. 9 Eq. 671. 1870.

## MOTION for decree.

By a deed of conveyance, dated the 23rd of April, 1866, a messuage, warehouse, and hereditaments, situate and being No. 15, Philpot Lane, "as the same were then in the occupation of" certain tenants, and another messuage, warehouse, and hereditaments situate and being No. 34, Eastcheap, in the city of London, "as the same were then in the occupation of Joseph Prime," were conveyed to such uses as the plaintiff, Charles Joseph Corbett, should appoint, and in default of appointment to the use of the plaintiff for life, remainder to uses to bar dower, remainder to the use of the plaintiff in fee.

By an indenture dated the 26th of June, 1866, the messuage, warehouse, and hereditaments at 34, Eastcheap, "as the same was then lately in the occupation of Joseph Prime and then of the said Charles Joseph Corbett," were conveyed by the plaintiff and another to the defendants, Thomas Rawley Hill and Edward Bickerton Evans, their heirs and assigns.

On each indenture there was a plan drawn in the margin.

Shortly after June, 1866, the defendants began pulling down the house and premises, No. 34, Eastcheap, and the plaintiff then discovered that one of the rooms on the first floor of his house, No. 15, Philpot Lane, projected into and was supported by the defendants' house. He also discovered that a cellar or vault belonging to his house, No. 15, Philpot Lane, projected under the basement-floor of the defendants' house; and that, on the other hand, a cellar or vault belonging to the defendants' house, No. 34, Eastcheap, projected under the basement of the plaintiff's house.

Neither of these three projections appeared in the plans, which were of the ground-floor. The projecting cellar belonging to the plaintiff's house was in part vertically under the projecting room belonging to the plaintiff's house.

The defendants, in rebuilding their premises, No. 34, Eastcheap, manifested an intention of building over the roof of the projecting room; in other words, of entering upon the vertical column of air above the projecting room; and they claimed the right to do this.

The plaintiff, on the other hand, claimed the column of air above the projecting room *usque ad cælum*; and, after a correspondence, filed the bill on the 3rd of October, 1868. On the same day the Master of the Rolls granted an *ex parte* injunction to restrain any further erection; but the defendants nevertheless proceeded on the 3rd and up to 12 o'clock on Monday, the 6th of October, when a notice to commit was served. By this time the walls of the building over the projecting room were finished, but not roofed in.

On the 3rd of December, 1868, the defendants moved before Lord Justice, then Vice-Chancellor, GIFFARD, to dissolve the injunction, when His Lordship dissolved the injunction, but reserved the costs to the hearing.

The bill was answered on the 12th of January, 1869, and amended on the 9th of February, and, as amended, prayed for a declaration that the projecting room was not comprised in the hereditaments conveyed to the defendants by the deed of the 26th of June, 1866, and for an injunction to restrain the defendants from erecting or building or placing any erection or structure over or on the roof of the projecting room, or any part thereof.

To the amended bill the defendants, on the 22nd of March, put in a voluntary answer.

SIR W. M. JAMES, V.C. In this case the plaintiff seeks an injunction to prevent the continuance of a building which has been erected over a certain room belonging to the plaintiff, which protrudes over the site of the defendants' house, No. 34, Eastcheap.

The plaintiff conveyed that house, No. 34, Eastcheap, to the defendants. He conveyed it by a plan which carefully delineates the site of the house.

Now the ordinary rule of law is, that whoever has got the *solum* — whoever has got the site — is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns, by the fact that other adjoining tenements, either from there having been once a joint ownership, or from other circumstances, protrude themselves over the site. The question then arises, whether the protrusion is a diminution of so much of the freehold, including the right upwards and downwards, as is defined horizontally by a section of the protrusion; or whether such a portion

only is carved out of the freehold as is included between the ceiling of the room at the top and the floor at the bottom.

In my opinion the protruding room here affects only a diminution of the last-mentioned limited character. The diminution does not extend beyond the protrusion itself, which the plaintiff has, of course, retained as part of his freehold in Philpot Lane. My opinion is that that room remains part of the Philpot Lane house; and that, although part of the house, it does not carry with it anything above it or anything below; but that, subject to the exception which has been obtained or made by reason of the protrusion, the owners of the house in Eastcheap still remain the owners of everything else, including the column of air above the room upon which the supposed trespass has been made.

That being so, it seems to me the plaintiff's case has failed, and the bill must be dismissed with costs.

The order will be that, the court being of opinion that the column of air over so much of the room in the bill mentioned as projected over the site of the ground floor of the house conveyed to the defendants passed to the defendants, the bill stand dismissed with costs, including the costs of the motion; but the order will be without prejudice to any question as to the ownership of the room.

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### LEMMON v. WEBB.

[1895.] A. C. 1.

APPEAL from an order of the Court of Appeal.

The appellant and respondent were adjoining landowners, the respondent having bought his land in 1879. On the appellant's land near the boundary were several large old trees, branches of which overhung the respondent's land, and had done so for much more than twenty years. The respondent, without giving notice to the appellant and without trespassing on his land, cut off a number of branches to the boundary line. The appellant brought an action against the respondent claiming: first, a declaration that the respondent was not entitled to cut any overhanging branches when the overhanging had continued many years and that he was only entitled to cut recent growth, and further or in the alternative that he was not entitled to enter upon the appellant's land for the purpose of cutting overhanging branches, either absolutely or at all events not until after due notice to the appellant; secondly, an injunction to restrain the respondent from cutting contrary to the above declaration; thirdly, damages for trespass and wrongful cutting.

KEKEWICH, J., held that the respondent was not entitled to cut the branches without notice to the appellant and gave judgment for the

appellant for £5 damages. The Court of Appeal (LINDLEY, LOPES, and KAY, L.JJ.) reversed that decision and dismissed the action.

LORD HERSCHELL, L.C. My Lords, the question raised by this appeal is whether, where branches of trees overhang the soil of another person, the person whose soil they overhang is entitled to remove those branches without notice to his neighbour on whose side of the boundary the trees grow. It is not disputed that if such notice be given, and if the neighbour do not remove the boughs, the person whose land they overhang would be entitled to do so, subject to the questions raised on the Prescription Act and the Statute of Limitations, which I will deal with in a moment. This of course involves an admission that against the will of the owner of the land the neighbour cannot insist that the boughs of his trees shall remain there, the only question being whether he is entitled to notice so that he may remove the boughs himself, or whether the person complaining of them may remove them. As regards the right, the difference does not seem to me to be one of extreme importance. In the present case, I think it is extremely probable that if notice had been given the plaintiff would not have removed the boughs, and that the defendant would have removed them after all. Nevertheless, if in point of law the person complaining of them can only remove them after notice, then the plaintiff in this action would be entitled to recover.

My Lords, it might be a reasonable provision of the law that such notice should be required, but whether it would be any great protection to the owners of trees near the boundary of their neighbour's land may be doubted. It might be very reasonable that there should be some law regulating the rights of neighbours in respect of trees, which, if planted near the boundary, necessarily tend to overhang the soil of a neighbour. It may be, and probably is, generally a very unneighbourly act to cut down the branches of overhanging trees unless they are really doing some substantial harm. The case is a very common one; such trees constantly do overhang, and it certainly might call for the intervention of the Legislature if it became at all a common practice for neighbours to exercise what may be their legal rights in thus cutting off what would frequently be a considerable portion of the trees which grow on the other side of their boundary.

But, my Lords, the question is whether there is any authority for the proposition that notice must be given by the owner of the land before thus removing the encroaching boughs. In support of the proposition that notice is requisite, not a single authority has been cited. Now it is certain that the boughs of trees have thus encroached, and that those whose land they have overhung have removed them, on many occasions. Actions in respect of such removal have occurred from time to time, the point at issue generally being whether the

soil over which the branches were spread was the soil of the one person or the other; but I never heard it suggested in any of those cases (and certainly I can remember more than one within my own experience) that notice to the adjoining owner was requisite before the boughs could be removed.

Now, my Lords, what are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil, where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; and there no doubt it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance except in a case of emergency, unless he has first given his neighbour notice to remove it. That is because his act involves an interference with his neighbour's soil — involves a trespass. But those cases of course are quite distinguishable from the present case where the act does not involve a trespass, but what is complained of is an encroachment on the soil of the man who removes the boughs, and what he does in getting rid of the encroachment is done on his own land, and therefore *prima facie* needs no excuse so far as the place where he is doing the act is concerned. The present case, therefore, seems entirely distinguishable from those; and the question whether there are any cases in which such a notice may be necessary does not arise here. The question is whether such a notice is necessary prior to the removal of boughs overhanging a man's own land.

My Lords, the only dictum that can be found on the subject is a dictum of BEST, J., in the case of *Earl of Lonsdale v. Nelson*, 2 B. & C. at p. 311, a case which is not in point, inasmuch as there the court had to determine whether the defendant could do acts upon his neighbour's land which involved considerable interference with his rights of property. BEST, J., says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them, but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road or the private property of the person who cuts them." There is, then, that dictum of BEST, J., on the point, but what seems to me more important is that there is not only no decision but no dictum whatever to be found to the contrary, and if we decided in favour of the plaintiff's claim we should not be interpreting the law, we should be making the law, and making it, not by the application of old principles to meet a new case, but by laying down conditions and limitations for the exercise of rights in a class of cases which has existed as long as the growth of trees and boundaries between neighbours have existed. It seems to me to be a case in which it is out of the question that we should lay down any proposition except

that which, so far as we can find, has been regarded as the law in times gone by. I think, therefore, there is no warrant for saying that notice was requisite.

NOTE. — In *Wandsworth Board of Works v. United Telephone Co.*, L. R. 13 Q. B. D. 904, FRY, L.J., said (p. 927): "As at present advised, I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above his freehold."

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BUTLER v. FRONTIER TELEPHONE CO.

186 N.Y. 486. 1906.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered December 6, 1905, affirming a judgment in favor of plaintiff entered upon a decision of the court at a trial term without a jury.

This is an action of ejectment, which was tried by consent before the court without a jury. The trial judge found as facts that "the defendant on or about January 1, 1903, without the consent of the plaintiff and without lawful authority, entered upon" his premises in the city of Buffalo "and stretched a wire over and across the same in the manner described in the complaint and maintained said wire upon said premises until January 10, 1903, when the defendant removed the said wire entirely from plaintiff's said premises."

According to the allegations of the complaint the wire was strung "about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side," reached "across the entire width of said premises."

The trial judge further found that "the plaintiff has been in possession of the premises described in the complaint at all times mentioned therein and since, except that portion thereof occupied by the defendant with said wire during the period specified." The damages sustained by the plaintiff were assessed at six cents for "the withholding by the defendant of that portion of the premises occupied by said wire for the period above specified." There was neither allegation nor evidence that the wire was supported by any structure standing upon the plaintiff's lot. The action was commenced on the 5th of January, 1903.

The court found as a conclusion of law that the plaintiff, as the owner in fee of the premises in question, "was entitled at the commencement of this action to have said wire removed from said premises, and is entitled to judgment against the defendant so declaring, and for six cents damages for withholding said property and for the costs of this action . . ."



The judgment entered accordingly was affirmed on appeal to the Appellate Division by a divided vote, and the defendant now comes here.

VANN, J. The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review. Questions similar but not identical, as they related to overhanging eaves, projecting cornices or leaning walls, were decided in favor of the defendant in *Aiken v. Benedict*, 39 Barb. 400, and *Vrooman v. Jackson*, 6 Hun, 326, and in favor of the plaintiff in *Sherry v. Freeking*, 4 Duer, 452. In *Leprell v. Kleinschmidt*, 112 N.Y. 364, the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other State, and upon the cognate question relating to projecting cornices and the like, the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin. *Murphy v. Bolger*, 60 Vt. 723; *McCourt v. Eckstein*, 22 Wis. 153; *Stedman v. Smith*; 92 Eng. C. L. 1. Others hold that there is not such a disturbance of possession as to sustain an action in that form. *Norwalk H. & L. Co. v. Vernam*, 75 Conn. 662; *Rasch v. Noth*, 99 Wis. 285. The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in *Wilmarth v. Woodcock*, 58 Mich. 482, 485, it was decided that equity would require the removal of a projecting cornice because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and appropriate the property of another and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by adverse possession." See, also, *Plummer v. Gloversville Electric Co.*, 20 App. Div. 527.

While some of the cases may be harmonized by resort to the distinction between "disseisins in spite of the owner, and disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but in-

sists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than fifty dollars damages. Code Civ. Pro. §§ 1525, 3228.

An action of ejectment, according to the Code, is "an action to recover the immediate possession of real property." Code Civ. Pro. § 3343, sub. 20. While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. Code Civ. Pro. §§ 1496 to 1532; Real Property Law, §§ 1, 218; 2 R. S. 303.

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is admitted by the pleadings that when the wire was put up the plaintiff was in possession of the entire premises and that he was entitled to the immediate possession thereof as owner when the action was commenced. The serious question is whether he was deprived of possession to the extent necessary to authorize ejectment. While ouster is essential to the maintenance of the action, it need not be entire or absolute, for it is sufficient if the defendant is in partial possession of the premises while the plaintiff is in possession of the remainder. *Sullivan v. Legraves*, 2 Str. Cases, 695; *Doe v. Burt*, 1 T. R. 701; *Lady Dacre's Case*, 1 Lev. 58; *Rowan v. Kelsey*, 18 Barb. 484; *Otis v. Smith*, 26 Mass. 293; *Gilliam v. Bird*, 8 Iredell [Law] 280; *Reynolds v. Cook*, 83 Va. 817; *McDowell v. King*, 4 Dana [Ky.] 67; Adams on Ejectment, 27; Newell on Ejectment, 38; Warvelle on Ejectment, 22. Mines, quarries, mineral oil and an upper room in a house are familiar examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property"? What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad celum et ad inferos*. The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface but also the space above and the part beneath. Co. Litt. 4 a; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th ed.]

\*401. "*Usque ad cælum*," is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So far as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto*. A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad cælum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions not now important, agree that the ability of the sheriff to deliver possession is a test of the right to maintain an action of ejectment. *Jackson v. Buel*, 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N.Y. 382, 389; *Patch v. Keeler*, 27 Vt. 252, 255; Warvelle on Ejectment, 34; Crabb on Real Property, 710; Butler's Nisi Prius, 99. "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." *Nichols v. Lewis*, 15 Conn. 137. The defendant insists that the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied there is no occasion for delivery,

because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced. *Wisner v. Ocumpaugh*, 71 N.Y. 113.

The judgment should be affirmed, with costs.

CULLEN, Ch.J., EDWARD T. BARTLETT, WILLARD BARTLETT and CHASE, JJ., concur; O'BRIEN and HAIGHT, JJ., absent.

*Judgment affirmed.*

NOTE. — In *Fay v. Prentice*, 1 C. B. 828, COLTMAN, J., said (p. 838): "The mere fact of the defendants' cornice overhanging the plaintiff's land, may be considered as a nuisance to him, importing a damage which the law can estimate."

In *Wandsworth Board of Works v. United Telephone Co.*, L. R. 13 Q. B. D. 904, BOWEN, L.J., said (p. 919): "If the board of works were in the position of simple owners of land, or if land had been vested in them by an ordinary conveyance, I should be extremely loth myself to suggest, or to acquiesce in any suggestion, that an owner of the land had not the right to object to anybody putting anything over his land at any height in the sky."

In *Smith v. Giddy*, [1904] 2 K. B. 448, it was held that an action lies against an adjoining landowner for allowing his trees to overhang the boundary to the damage of the plaintiff's crops.

In *Smith v. Smith*, 110 Mass. 302, MORTON, J., said (p. 303): "This is an action of tort in the nature of trespass *quare clausum fregit*. The plaintiff in his declaration, among other acts of trespass, alleges that the defendant built a part of his barn upon the plaintiff's close, and thereby put and kept the plaintiff out of the possession and

occupation of a part of the close. We think it was competent for the plaintiff to prove that the eaves of the defendant's barn projected over the plaintiff's close. Projecting his eaves over the plaintiff's land is a wrongful act on the part of the defendant which, if continued for twenty years, might give him a title to the land by adverse occupation. It is a wrongful occupation of the plaintiff's land for which he may maintain an action of trespass."

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CLIFTON v. BURY.

4 Times, Law Reports, 8. 1887.

THIS was an action to restrain the 12th Middlesex (or Civil Service) Volunteer Corps from shooting over a certain range on Wimbledon Common to the detriment of the plaintiff's land.

Mr. Justice HAWKINS delivered an opinion, a part of which follows:—

As regards the complaint that when the 1000 yards range was used the bullets traversed the land of the plaintiff, His Lordship did not look upon the ground of complaint as constituting a trespass in the strict technical sense of the term; but he did look upon such firing of bullets as grievances which, under the circumstances, afforded the plaintiff a legal cause of action. It was said that no damage was proved to have arisen to the plaintiff. In one sense that was true, for no actual injury had been occasioned to him personally or to his land, and no bullet was proved to have fallen upon it during the use of that range. Probably the fall of a bullet on the land would be a very rare occurrence. Still, though the land dipped in the part of the farm traversed, and though the height of the trajectory above the surface would ordinarily be 75 feet, according to the evidence, the traversing of the land by the bullets in the use of the 1000 yards range was not unattended with risk, and certainly it would cause a not unreasonable alarm, which rendered the occupation of that part of the farm less enjoyable than the plaintiff was entitled to have it. His Lordship was satisfied, therefore, that the plaintiff had a legal grievance sufficient to enable him to maintain an action.

NOTE. — See *Whittaker v. Stangvick*, 100 Minn. 386.

In *Pickering v. Rudd*, 1 Starkie 56, Lord ELLENBOROUGH said (p. 58): "You must prove that the projection is a trespass; it may be a very nice question. — I recollect a case, where I held that firing a gun loaded with shot into a field was a breaking of the close. The learned judge on the circuit with me, doubted upon the point, but many with whom I afterwards conversed on the subject, thought I

was right; and the judge himself, who at first differed from me, was afterwards of the same opinion; but I never yet heard, that firing *in vacuo* could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained: but it may be questionable, whether an action on the case would not be the proper form. Would trespass lie for passing through the air in a balloon over the land of another?"

In *Kenyon v. Hart*, 6 B. & S. 249, BLACKBURN, J., said (p. 252): "That case raises the old query of Lord ELLENBOROUGH as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it."

In *Smith v. Giddy*, [1904] 2 K. B. 448, KENNEDY, J., said (p. 451): "If trees, although projecting over the boundary, are not in fact doing any damage, it may be that the plaintiff's only right is to cut back the overhanging portions."

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### STURGES v. BRIDGMAN.

L. R. 11 Ch. D. 852. 1879.

THE plaintiff in this case was a physician. In the year 1865 he purchased the lease of a house in Wimpole Street, London, which he occupied as his professional residence.

Wimpole Street runs north and south, and is crossed at right angles by Wigmore Street. The plaintiff's house was on the west side of Wimpole Street, and was the second house from the north side of Wigmore Street. Behind the house was a garden, and in 1873 the plaintiff erected a consulting-room at the end of this garden.

The defendant was a confectioner in large business in Wigmore Street. His house was on the north side of Wigmore Street and his kitchen was at the back of his house, and stood on ground which was formerly a garden and abutted on the portion of the plaintiff's garden on which he built the consulting-room. So that there was nothing between the plaintiff's consulting-room and the defendant's kitchen but the party-wall. The defendant had in his kitchen two large marble mortars set in brickwork built up to and against the party-wall which separated his kitchen from the plaintiff's consulting-room, and worked by two large wooden pestles held in an upright position by horizontal bearers fixed into the party-wall. These mortars were used for breaking up and pounding loaf-sugar and other hard substances, and for pounding meat.

The plaintiff alleged that when the defendant's pestles and mortars were being used the noise and vibration thereby caused were

very great, and were heard and felt in the plaintiff's consulting-room, and such noise and vibration seriously annoyed and disturbed the plaintiff, and materially interfered with him in the practice of his profession. In particular the plaintiff stated that the noise prevented him from examining his patients by auscultation for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention.

The use of the pestles and mortars varied with the pressure of the defendant's business, but they were generally used between the hours of 10 A.M. and 1 P.M.

The plaintiff made several complaints of the annoyance, and ultimately brought this action, in which he claimed an injunction to restrain the defendant from using the pestles and mortars in such manner as to cause him annoyance.

The defendant stated in his defence that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than sixty years, and that he had used the second pestle and mortar in the same place and to the same extent as now for more than twenty-six years. He alleged that if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the plaintiff suffered any serious annoyance, and pleaded a prescriptive right to use the pestles and mortars under the 2 & 3 Will. 4, c. 71.

Issue was joined, and both parties went into evidence. The result of the evidence was that the existence of the nuisance was, in the opinion of the court, sufficiently proved; and it also appeared that no material inconvenience had been felt by the plaintiff until he built his consulting-room.

THESIGER, L.J. The defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in Wigmore Street. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The plaintiff, who is a physician, is the occupier of a house in Wimpole Street, which until recently had a garden at the rear, the wall of which garden was a party-wall between the plaintiff's and the defendant's premises, and formed the back wall of the defendant's kitchen. The plaintiff has, however, recently built upon the site of the garden a consulting-room, one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the plaintiff in the use of his consulting-room, and which, unless the defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The defendant contends that he had acquired the

right, either at common law or under the Prescription Act, by uninterrupted user for more than twenty years.

In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the plaintiff or to any previous occupier of the plaintiff's house by what the defendant did. It is true that the defendant in the 7th paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion, about thirty years before, requesting him if possible to discontinue the use of the mortars before eight o'clock in the morning; and it is true also that there is some evidence of the garden wall having been subjected to vibration, but this vibration, even if it existed at all, was so slight, and the complaint, if it could be called a complaint, of the invalid lady, and can be looked upon as evidence, was of so trifling a character, that, upon the maxim *de minimis non curat lex*, we arrive at the conclusion that the defendant's acts would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question whether the defendant endeavours to assert his right by common law or under the Prescription Act. That act fixes periods for the acquisition of easements, but, except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements, or of the user or enjoyment by which they are acquired. This being so, the laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario*; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in *Webb v. Bird*, 13 C. B. (N.S.) 841, that currents of air blowing from a particular quarter of the compass, and in *Chasemore v. Richards*, 7 H. L. C. 349, that subterranean water percolating through the strata in no known channels,



could not be acquired as an easement by user; and in *Angus v. Dalton*, 4 Q. B. D. 162, a case of lateral support of buildings by adjacent soil, which came on appeal to this court, the principle was in no way impugned, although it was held by the majority of the court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your consent to your neighbour enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases — the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. *Webb v. Bird* and *Chasemore v. Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go — say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave

Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equal degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the court below took substantially the same view of the matter as ourselves and granted the relief which the plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.

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HURLBUT v. McKONE.

55 Conn. 31. 1887.

SUIT for an injunction against the continuance of a nuisance and for damages; brought to the Superior Court in Hartford County. The complaint alleged the plaintiff's ownership of a house and lot on Governor Street, in the city of Hartford, and his occupancy thereof as a residence; and that the defendants, in May, 1884, owned and possessed a lot of land on Sheldon Street, adjoining the plaintiff's lot, and erected thereon a wooden building, some sixty by thirty feet and two stories high, within a few inches of the plaintiff's lot, one end of which is about twenty feet from the plaintiff's wooden dwelling-house, and the other two feet from his barn, and put therein a steam engine, circular band and cut-off saws, planing, molding,

mortising and variety molding machines, and have ever since owned and operated said machines in their business of builders, and in so doing have used said machines daily; and that the use of said machines makes so loud a noise as to render it impossible, while they are being operated, to hear ordinary conversation in the plaintiff's house, and when operated together the noise is intolerable, and from their use dense volumes of smoke and cinders fill the plaintiff's house and premises, and cause great discomfort to him and his family, and by the noise, smoke and cinders the plaintiff and his family are harassed, annoyed, their health endangered, and the premises rendered uncomfortable and unfit for habitation, and his carpets, furniture and clothing soiled and damaged, and his property greatly reduced in value.

The case was heard before ANDREWS, J., who made the following finding of facts: The plaintiff and the defendants are respectively the owners and in the occupation of the lots of land of which they are severally described in the complaint as being the owners. The land of the defendants abuts on the lot of the plaintiff, so that the southeast corner of the defendants' land is only twenty-one feet from the plaintiff's house. The plaintiff occupies the lower part of his dwelling-house for himself and family; the upper part he rents to tenants. In the summer and fall of 1884 the defendants erected on their lot, close to their easterly and southerly line, a two-story wooden building, in which they placed a steam boiler and engine to supply motive power for various machines, which also they placed in the building, and which they have continued to operate from that time to the present time, namely, two planing machines, a moulding machine, a mortising machine, a cut-off saw, a buzz-saw, and a whip-saw. The defendants are contractors and builders, and use the machinery in their own business. They employ steadily but two men in operating the machines. At times, however, when there is a pressure in their business, they employ more, sometimes as many as five or six. The machinery is used only in the day time, between the hours of six in the morning and six in the afternoon. They use the shavings and saw-dust from their machines for fuel to generate steam. Such light and combustible fuel makes a great deal of smoke and cinders. The machinery, whenever it is in motion, makes much noise; so great is the noise of the machinery, and so near is it to the plaintiff's house, that when it is in motion it is impossible for the plaintiff or the members of his family to read, write or carry on conversation without great difficulty. It causes the house to jar so that the windows rattle in the casings; dishes and other like things standing on the table or on shelves will shake and jolt together. The health of the plaintiff and his family has been injured. A tenant in the house, a Mrs. Whiting, was sick there and died. Her medical attendant testified in court that she suffered greatly from

the noise of the defendants' machinery, and that her disease was aggravated and her death hastened by it. The wife of the plaintiff, being in a delicate state of health, has suffered very much from headaches caused by the noise. The value of the house has been and is greatly impaired, especially its rental value. The plaintiff has been unable to procure tenants, and such as he does procure are unwilling to pay as much rent as he before received. The smoke and cinders from the defendants' chimney came into the plaintiff's yard and into his house whenever a door or a window was opened. Clothes in the yard hung out to dry were made foul so that they had to be washed again. Everything in the house was soiled — the floors, carpets, walls, windows, curtains, and even the table on which they ate their meals. Upon more than one occasion the plaintiff and his family were unable to eat the meal which had been prepared for them, so dense and noisome was the smoke which came into the house from the defendants' mill. In some or all of these ways the plaintiff has been troubled, annoyed, injured, discomforted, and distressed, and the house made almost uninhabitable, ever since the defendants erected their mill.

Sheldon Street, on which the defendants live, runs east from Main Street to Commerce Street. On this street there are various manufacturing establishments in which machinery is used. The property next west of the defendants' premises is owned by the National Screw Company. This property runs clear across from Sheldon Street to Charter Oak Street, and at the rear of the plaintiff's lot. It is occupied by various tenants engaged in various manufacturing enterprises, to wit: American Paper Barrel Company, Bailey Letter Press Company, Capewell Horse Nail Company, Mather Electric Light Company, Strickland & Shay's sawing, turning and planing mill, and Ricken's planing and molding mill. In the latter mill, which is immediately in the rear of the defendants' premises (but with other buildings between), and distant about one hundred and fifty feet, are two planing machines of much greater size and power than the planer of the defendants. The noise made by a planing machine does not depend upon the size or the power of the machine, but upon the width of the board which is being planed.

Within one thousand or fifteen hundred feet of the defendants' premises there are a number of other manufacturing establishments, and the neighborhood within the distance above stated is largely occupied by mechanics and by tenement houses.

The noise made by the defendants' machinery when running is perhaps less than some of the other noises made within the neighborhood. A noise, however, may be an extreme and perhaps an intolerable nuisance to one who lives within a few feet or yards of it, while to a person a little removed, especially if other objects inter-

vene, although he is within reach of the sound, it may be of no inconvenience at all.

Since the commencement of this suit the defendants have re-set their boiler and engine, and have built a large and high smoke-stack, so that the annoyance to the plaintiff from smoke and cinders is mostly, but not quite wholly, abated.

Upon these facts the court assessed the damages at one thousand dollars, but in view of the change made by the defendants in the mode of operating their works, held the injunction prayed for to be unnecessary and did not grant it. The defendants appealed.

LOOMIS, J. This surely was no trifling inconvenience which the civilities of good neighborhood, in a thickly settled and industrious community, required the plaintiff to bear in silence, nor was it a matter painful merely to a cultivated taste, but the finding makes it, beyond all controversy, a matter of great physical discomfort, powerfully affecting the comfortable enjoyment of the plaintiff's home, and impairing the health of his family and the value of his property.

But it is suggested that the defendants' business was *per se* lawful, and the use made of their own property was reasonable.

We concede that the law will not interfere with a use that is reasonable. But the question of reasonable use is to be determined in view of the rights of others. Even a cooking stove may be so located and used as to make it a nuisance to the adjacent proprietor, as in *Grady v. Wolson*, 46 Ala. 381. The owner may erect buildings with chimneys and build fires therein in a proper manner, because these are among the necessary incidents to such property, but he has no right to burn fuel in the making of such fires that develops dense masses of smoke to the injury of his neighbor, nor to build his chimneys so as to send the smoke into his neighbor's house. Wood on Nuisances, sec. 432.

It is further said that the place in question was a manufacturing locality, and that the plaintiff's annoyances and damage were only such as were incident to the neighborhood where he had elected to reside.

In determining whether the defendants violated any just rights of the plaintiff, the location and surroundings are to be considered, for it is undoubtedly true that what constitutes a nuisance in one locality may not be in another, and we can fully accept the rule laid down in *McCaffrey's Appeal*, 105 Penn. St. 253: "A person who resides in the centre of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily hear some of the noise and occasionally feel slight vibrations produced by the movement and labor of its people and by the hum of its mechanical industries."

And if we should adopt the distinction laid down by Lord Chan-

cellor WESTBURY in *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cases, 650, cited by the defendants, between a nuisance producing a material injury to property, where the right of action is absolute, and an alleged nuisance which produces merely personal annoyance and discomfort, where the right of action depends "greatly on the circumstances of the place where the thing complained of occurs," we still think there is no authority that would deny a right of action under the facts and circumstances of this case as described in the finding. The vivid language of THOMPSON, J., in delivering the opinion in *Dennis v. Eckhardt*, 3 Grant, 302, with slight changes would seem to describe this case: "Some discomforts must be endured as compensation for the conveniences of city life . . . but I cannot find authority in law for saying that a thing which fills the atmosphere that others have a right to live in with offensive smoke and odors, stifles the breath, produces nausea and headache, . . . prevents the drying of clothes and ventilation of houses, darkens the sunlight, and converts pleasant residences into prison-houses in dog-days, and defiles carpets, curtains and dinner plates with deposits of soot and dirt, is not a nuisance, even though the results are only occasional."

The claim of the defendants, that the locality is one "given over to mechanical industries," is not in full accord with the finding. The plaintiff's house is on Governor Street, and on this street there is no claim that there are any manufacturing establishments. There are such on Sheldon Street, and it is found that "within one thousand or fifteen hundred feet of the defendants' premises there are a number of other manufacturing establishments, and the neighborhood within the distance above stated is largely occupied by mechanics and by tenement houses." All these manufacturing establishments are of course still more remote from the plaintiff's house, and the distance obviously is so great as to preclude any annoyance from smoke, cinders or the jar of machinery, and the noise must be so softened that it could not well be a nuisance. All the discomfort which the plaintiff can suffer, therefore, of the kind referred to, must come from the establishment of the defendants, only twenty-one feet distant from his house. It is probably in the power of the defendants, without great expense, to avoid all just ground for complaint. The court finds they have already done so, mostly in respect to smoke and cinders.

In regard to the suggestion that the plaintiff elected to reside in this locality, there is nothing to show that the objectionable business of the defendants had ever been carried on before the plaintiff took possession, but rather the contrary, for they did not build till 1884. If, however, it were otherwise, and the plaintiff knew of the nuisance, and then went and took up his abode near it, he would not thereby be precluded from maintaining his action. A man is not to be pre-

cluded from building and living on his own land because the adjoining proprietor first erected a nuisance, which indeed was no nuisance till somebody went there to live. *Hale v. Barlow*, 27 L. Jour., C. P., 208; *Commonwealth v. Upton*, 6 Gray, 473; *Fertilizing Co. v. Hyde Park*, 97 U. S. R. 659. In regard to any suggestion arising from the fact that the dwelling houses in the vicinity are largely occupied by mechanics and tenants, we fully approve and adopt the language of Chancellor ZABRISKIE in delivering the opinion in *Ross v. Butler*, 19 N. Jersey Eq. 294: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper or convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families, by offensive smells, smoke, cinders or intolerable noises, even if the inhabitants themselves work at trades occasioning some degree of noise, smoke and cinders. There is no principle in law or reason which would give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer and their families the fewer and more restricted comforts which they enjoy."

NOTE. — In *St. Helen's Smelting Company v. Tipping*, 11 H. L. Cas. 642, the plaintiff complained that the defendant "caused large quantities of noxious gases, vapours, and other noxious matter, to issue from the said works, and diffuse themselves over the land and premises of the plaintiff." The court approved the action of the trial justice in instructing the jury that "an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbours; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for if so, the business of the whole country would be seriously interfered with."

## CHAPTER III.

## WATER.

## TYLER v. MASON.

4 Mason (U.S. C. C.) 397. 1827.

STORY, J. *Prima facie* every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque filum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, sub-



versive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, *sic, utere tuo, ut non alienum lēdas*.

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PENNSYLVANIA RAILROAD CO. v. MILLER.

112 Pa. 34. 1886.

CASE brought by Frank P. Miller against the Pennsylvania Railroad Company, August 24th, 1883, for the recovery of damages resulting to him by reason of the insertion of a pipe in Brandywine Creek, above the plaintiff's mill, on the land of the defendant, and the consequent diminution of the water supply at the mill of the plaintiff. Plea, not guilty.

The following facts appear on the trial before FUTHEY, P.J.:—

The defendant in error is the owner, as tenant for years, of a paper mill near Downingtown, Pa. The mill is run by water power, and is wholly supplied with water drawn from a dam in the Brandywine Creek. The breast of the dam is erected on the lands of the defendant in error. The back or still water of the dam extends up the bed of the Brandywine Creek several hundred yards above and beyond the point where the railroad of the plaintiff in error crosses said creek on a bridge over the same. The right to maintain said dam, and back the water above and across the line of the railroad, was conveyed to defendant's predecessors in title in the year 1798, and has belonged to them ever since that date, and has been maintained as it now exists for over half a century.

The plaintiff in error is the owner by purchase from the Commonwealth of Pennsylvania of a railroad running from Harrisburg to Philadelphia, which crosses the Brandywine Creek, where the same stands as still water in the defendant's dam, several hundred yards below the head of the same. At this point of crossing the railroad is conducted over the dam upon a bridge. The bed of the stream beneath said bridge was not at any time physically occupied by the railroad of the State, and has not been since it was purchased by the plaintiff in error.

For some years prior to 1881, the plaintiff in error was supplied with water for the uses of their road by the Downingtown Gas and Water Company, from a point about a mile west of the Brandywine Creek. In the summer of 1881, the plaintiff in error, being unable to agree with the Water Company for the price to be paid for this supply of water, which had previously been at the rate of \$2,000 per year, erected an engine on the banks of the dam of the defendant in error, for the purpose of supplying themselves with water to be pumped therefrom. The defendant protested but to no avail. A

six-inch iron pipe was inserted in his dam, two or three feet below the surface thereof, and large quantities of water have been since constantly pumped therefrom by day and night, and conveyed in pipes to the tanks of the plaintiff in error, a mile distant. By this act, the defendant's water supply was materially diminished, and he subjected to considerable loss, for which this suit was brought.

After the case of the plaintiff in the court below was in, the defendant, to show a right to take the water without liability to this suit, offered in evidence the deed from the Commonwealth for the main line of the public works. Neither the charter of the plaintiff in error, nor the supplemental Acts of Assembly, conferring special privileges upon it, were offered as proofs or specially pleaded.

No compensation was ever made the defendant in error, nor was security given before or since the water was taken.

Mr. Justice PAXSON delivered the opinion of the court April 19th, 1886.

This was an action brought in the court below against the Pennsylvania Railroad Company for diverting the water from the Brandywine Creek, to the injury of the defendant in error, who is the owner of a mill property on that stream below the railroad. The water is taken within the line of the road and upon the property of the company. The land covered by the water at this point belongs to the company in fee simple. The water is pumped up from the creek into large tanks and is then used to supply the locomotives of the company. The plaintiff alleges that the quantity taken was so large as to seriously impair the power of his mill, and hence this suit.

It was contended upon the trial below, and it was urged here that the proceeding should have been by a jury of view under the Act of May 16th, 1857, and not by a common law action. We do not regard this point as tenable, for the reason that the water was not taken by the company under the right of eminent domain, but by virtue of its rights as a riparian owner. As before stated, it owns the land in fee simple at the point where the water is taken, and has precisely the right of every other riparian owner on that stream. It may use the water as other owners use it without responsibility to any one therefor, provided such use is not of a character to injure other riparian owners on the same stream.

The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered, and that any interruption of or interference with the rights of the lower riparian owner is an injury for which an action will lie, unless too trifling for the law to notice: *Wheatly v. Chrisman*, 24 Penn. St. Rep. 298. The size and capacity of the stream has always an

important bearing upon questions of this nature. Every riparian owner has the right to use the water of the stream passing over his land for ordinary domestic purposes, and if the stream be so small that his cattle drink it all up, while it may be a loss to the lower riparian owner, it is *damnum absque injuria*. But where the upper riparian owner diverts or uses the water, not for ordinary domestic purposes, such as are inseparable to and necessary for the use of his land, but for manufacturing or other purposes, having no necessary relation to his use of his land, the case is different. In *Wheally v. Chrisman*, *supra*, it was held that "a proprietor of land over which a stream of water runs has, as against a lower proprietor, the use only of so much of the stream as will not materially diminish its quantity. His right is not to be measured by the reasonable demands of his business." In that case the allegation was that the stream had been diverted by one riparian owner in order to work his lead mine to such an extent as to sensibly diminish the supply to the lower owner; and that such use was necessary in order to enable him to carry on his business. It was said by this court: "The proposition of the defendant was that he had a legal right to use a *reasonable* quantity of the water for the purposes of his business. The court below replied that his business might reasonably require more than he could take consistently with the rights of the plaintiff. We cannot see how or on what principle the correctness of this can be impugned. The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. . . . The defendant had a right to such use as he could make of the water without materially diminishing it in quantity. . . . If he needed more he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own."

This is conclusive of the present controversy. As before observed, the railroad company may use this water by virtue of its rights as riparian owner; but such use must be such as not to sensibly diminish the stream to the riparian owner below. The water belongs to both, and if the former wants more than its share it must take it under its right of eminent domain and pay for it.

*Judgment affirmed.*

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### HIGGINS v. FLEMINGTON WATER CO.

36 N. J. Eq. 538. 1883.

BEASLEY, C.J. The complainants, who are the appellants here, filed their bill to enjoin the defendant from diverting part of the

water of an ancient water-course from their mill. The facts which must be taken as established are these: The complainants' property is situated on the South Branch of the Raritan River, which is a stream of considerable volume except in times of drouth; the defendant is a corporate body, constituted for the purpose of supplying the village of Flemington with water, and to that end, finding its supply of water from other sources insufficient, contracted with the owners of a mill on the stream in question, to pump from such stream, at a point above the premises of the complainants, and to force through pipes into its reservoir, such a quantity of water as would form the complement of its resources. This supplementary supply was necessary only in times of scarcity of water, and at such times, the natural stream, if left undiminished, was insufficient for the purposes of the complainants; and the *quantum* which would be thus abstracted by the defendant, though not very great, would be of such magnitude as to work a sensible and essential detriment to the complainants, and would therefore be of a character that its abstraction cannot be disregarded by force of the maxim *de minimis, &c.*

On the part of the defence the application for the injunction on final hearing was resisted on two grounds: the first of these being the contention that as the mill-owners, with whom the defendant had contracted for the additional supply of water, were riparian proprietors, it was clothed with the rights appertaining to such ownership, one of such rights being the legal authority to take water from the stream for the uses to which it was applied. The exact assumption of this proposition is this, that a riparian proprietor can lawfully not only use the water as it passes over his property for his own domestic, agricultural or similar purposes, but that, although such an appropriation works a palpable damage to a riparian owner further down the stream, he can sell out the use of such water to strangers, and that it may be diverted to lands not riparian for the purposes of such alienation. But I have, in my researches, altogether failed to find either any authority or any legal principle which will sustain this position. The definitions of Chancellor Kent in his Commentaries, of the legal title of riparian proprietors, have been frequently quoted with approbation by the courts of England and of this country, and yet, as long ago as the year 1816, this great lawyer decided, in a case that I believe has never in any wise been questioned, that the legal power to make such a diversion of the water as is here claimed did not exist. The case referred to is that of *Gardner v. Trustees of the Village of Newburgh*, 2 Johns. Ch. 162. The facts were these: the complainant's farm was crossed by a stream which came from a spring arising in an adjacent farm, and the defendants, who had been authorized to supply the village of Newburgh with water, had obtained leave of the owner of such spring to use and divert the water or a part of it, for the purpose mentioned

If the owner of this spring had possessed the right to transfer to a water company the privilege of using the water of the stream for domestic purposes, to the deprivation of other owners of land upon the water-course, the complainant in the Newburgh case would have been in court destitute of all legal or equitable standing-ground; but such was not the view taken by the court of the situation, for it was held that the defendants, by force of these contracts with the owner of the spring, gained no right to make the diversion complained of, and that the complainant's claim to equitable protection was so clear that he was entitled even to a preliminary injunction. This decision was cited as authority in this State in *Van Winkle v. Curtis*, 2 Gr. Ch. 427.

And it appears to me that viewed in the light of all the legal decisions which upon this subject have been since made, this case is to be considered as having been correctly adjudged. The general principles of law which define the rights in these natural streams, arising from riparian proprietorship, have become now firmly established by a long line of adjudications. Thus it is settled that the right to flowing water is an incident to the proprietorship of the lands along or over which such stream flows; that such right is common among all such proprietors, and that each of them is entitled to its reasonable use, and that so long as such use be reasonable a co-proprietor cannot complain of the consequences of such appropriation. Thus, beyond all question, a riparian proprietor may use the passing water, in a reasonable manner, for domestic uses, or for the irrigation of his lands, or doubtless for other purposes, under the same restriction. The cases cited in the learned brief of the counsel of defendant illustrate and exemplify this doctrine. Thus, in the important case of *Embrey v. Owen*, 6 Exch. 353, it was declared that, in a suit for the diversion of part of the water of a stream, it was properly left to the jury to settle the case on the point whether or not they found there had been a sensible diminution of the water by reason of the diversion. The diversion had been made by a riparian proprietor for the purpose of irrigation, and it was therefore plain, according to the law as just stated, that an abstraction from the stream for such a purpose, which produced no sensible diminution of the stream, could not be said to be an unreasonable use of the water. The case of *Elliot v. Fitchburg Railroad Co.*, 10 Cush. 191, is founded on similar principles. This was the case of a railroad company, which, by an arrangement with a riparian proprietor, had diverted a small quantity of water from a stream for the purpose of furnishing their steam engines with water, and the court, on review of the rulings of the judge at the trial, maintained that an instruction to the jury to the effect that "unless the plaintiff suffered actual, perceptible damage in consequence of the diversion, the defendants were not liable" in the action, was correct. The reason of these decisions is stated

in the former of these two cases just cited: "so long," says the court, "as this reasonable use by one man of this common property does no actual and perceptible damage to the right of another to the similar use of it, no action will lie."

These cases, as well as the others to the same effect contained in the brief of counsel, were, beyond all doubt, correctly decided; and they are all of them obviously hostile to the pretensions of the defence in the present case; for it has been already stated that in the present instance the diversion which is here threatened will work an actual and perceptible damage to the complainant, and these authorities, as we have seen, explicitly held that for such a diversion an action is maintainable. The instruction to the jury in each of these rejected cases just considered was to the effect that the plaintiff must succeed, if it appeared from the evidence that the diversions of the water had, according to the instruction to the jury in one case, occasioned a sensible diminution of the water, or as it was expressed by the trial judge in the other, had produced "an actual and perceptible damage" to the plaintiff. By the test of the rule thus applied there can be no question with respect to the present complainant's right to a legal remedy for the diversion of the water by the respondent. In estimating the extent of the wrong done the complainant, it is also to be remembered that the damage is of a kind to increase as time passes, for as the population of the village enlarges, the supply of water must be proportionately extended; and that this diversion is made under a claim of right, which, if continued, will, after the lapse of the requisite period of time, grow into a legal right. It seems to me that it is entirely clear that the complainant has sustained a wrong by this act of the defendant, which entitles him to legal redress.

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PITTS v. LANCASTER MILLS.

13 Met. (Mass.) 156. 1847.

THIS was an action of trespass upon the case; and the declaration alleged that Samuel Carter was seized and possessed of a close, water mill, ancient dam, and the water privileges thereto appertaining, situate on the north branch of Nashua River, in Lancaster, and the right of having the whole water of said stream flow, without obstruction, for the benefit of said mill, and of having the uninterrupted use and occupation of said mill and privileges; and that said Carter, being so seized and possessed, leased the said premises, for a term of years, to Hiram Pitts, who underlet the same to the plaintiffs; that the defendants, a corporation established by St. 1844, c. 20, in the months of June and July, 1845, wrongfully built and raised,

above its usual height, their dam, situate across said stream, above the mill, dam and privilege occupied by the plaintiffs, and thereby hindered the water from flowing in its usual course, and thereby, for the space of two days during the said month of June, and four days during said month of July, wholly cut off the water from the plaintiffs' mill, etc.

The case was submitted to the court upon the following agreed statement of facts: "The plaintiffs are the lessees of said mill, dam and privileges, as alleged in their declaration. The defendants were the owners of a privilege on said stream, above the mill of the plaintiffs, whereon a mill had stood for some years; they erected a new mill thereon, and, for the purpose of using the whole power, raised the dam higher than it had formerly been, and kept the water back, so long as was necessary to fill their pond, and no longer. To have delayed filling said pond, until a freshet or flow of water should have raised the same, would have endangered said dam; and by keeping the water back, as aforesaid, the operations of the plaintiffs' mill were retarded or wholly suspended."

The parties agreed that if, upon the facts above stated, the action could be maintained, damages should be assessed by an auditor; otherwise, that a nonsuit should be entered.

SHAW, C.J. Every proprietor of land, through which a current of water flows, has a right to the use of it on his own land, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can make consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. 8 Met. 476.

It appears by the facts stated in this case, that the defendants were proprietors of land and mills above those of the plaintiffs on the same stream; that having erected a new dam, which they had a right to do, they detained the water no longer than was necessary to raise their own head of water and fill their own pond. The court are of opinion that this was not an unreasonable use of the water-course by the defendants, and that any loss, which the plaintiffs temporarily sustained by it, was *damnum absque injuria*.

*Plaintiffs nonsuit.*

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PEOPLE v. ELK RIVER CO.

107 Cal. 214. 1895.

TEMPLE, J. This appeal is by the defendant from the judgment upon the judgment-roll.

The action was brought on relation of the Ricks Water Company to abate certain structures as nuisances. Among other things it was charged that the defendant had constructed and was maintaining on the banks of the south fork of Elk River "a large sawmill, and also a cookhouse, outhouses, barn, and stables, and other fixtures which usually accompany a sawmill."

It was averred "that said defendant has caused and permitted, and does cause and permit, all sewage, offal, waste, and fetid matter from said sawmill, cookhouse, and stables to be drained and deposited in the waters of said stream, and continues to do so, thereby contaminating, polluting, and rendering the same unwholesome and unfit for culinary and other generally domestic purposes, and offensive to the senses."

As to most of the structures mentioned, the court found that they did not constitute nuisances, but it was found as follows: "That on the banks of said stream, just above the milldam, defendant had erected a large stable in which it houses from twenty-five to thirty head of cows. That the droppings from these cattle are deposited upon the banks of said stream, and near thereto, where the land gradually slopes to the same.

"That there now exists at said point a pile of manure about seventy feet in length, eight feet deep, and sixteen to eighteen feet in width, and which has been accumulating there for years. That the defendant allows and permits this large pile of manure to lie there and rot on the bank of said stream, and the drainage therefrom flows directly into the waters of said stream and pollutes the same, and renders the waters thereof offensive to the senses, and unwholesome and unfit for domestic uses. That defendant also maintains near said stream a corral or pen in which it keeps about twenty-five hogs. That the said stream forms one side of said pen, and the urine and droppings and filth from said hogs find their way into said stream, thereby polluting the waters thereof, and rendering the same offensive to the senses, and unwholesome and unfit for domestic uses."

And as matter of law it was found that the hogpen and manure-pile constitute nuisances, and defendant was enjoined from maintaining them.

From this part of the decree defendant appeals, and his first point is that this finding is not within the issues.

The hogpen and manure-pile are not mentioned in the complaint, and it is not found that they are such fixtures as usually accompany a sawmill. The complaint, however, speaks of outhouses and stables, and I think the findings sufficiently show that the cow-stable and hogpen are maintained in connection with the mill plant; and, notwithstanding appellant's criticism, that the manure-pile is caused by the cow-stable. Beyond this the complaint seems to be that the court did not suppress the stable itself rather than the use of it,



which renders it a nuisance. I do not think there was any error here of which the defendant can complain.

The court found that Elk River is not a navigable stream. It is contended that it follows from that fact that fouling its waters cannot constitute a public nuisance. But it is found that "the waters of Elk River at and below the defendant's dam were, and have been, and now are, used by a considerable number of persons, who reside along the banks of said stream below the defendant's mill and dam." This constitutes such a public use as would make a pollution of the water by any unreasonable use a public nuisance.

We may leave out of view, therefore, the claims of the Ricks Water Company and the inhabitants of the city of Eureka altogether. While, as to lower riparian owners, the defendant is entitled to a reasonable use of the water, he has no right to pollute the stream by putting such matter directly into it.

The decision does not go to the extent that appellant apprehends. It does not determine that one may not depasture stock upon the lands comprising the watershed drained by the river, because they would necessarily pollute the water, nor that he cannot maintain stables and hogpens upon the land, but only that they must not be in, or directly upon, the banks of the stream. It holds that this is an unreasonable use of such streams by a riparian owner as against lower riparian owners. But if stock, not confined upon the river-banks, following their natural instincts cause such pollution it would be a different matter. So, if the hogpen and the cow-stable were at a reasonable distance from the river, the fact that the winter rains washed some impurities into the stream would be something of which lower riparian proprietors could not complain. The acts enjoined are equivalent to actually putting the polluting material directly into the water. If the conformation of defendant's land is such that he cannot carry on a dairy without putting such filth directly into the water, then he must find some other use for the land. This seems to be the effect of the rule laid down in *People v. Gold Run*, 66 Cal. 138; 56 Am. Rep. 80.

*The judgment is affirmed.*

NOTE. — *Young v. Bankier Distillery Co.*, [1893] A. C. 691. The appellant pumped water, pure but hard in quality, into a burn, the water of which was soft in quality. This made the water of the burn hard. The hard water was much less suitable for distilling than the naturally soft water of the burn. The respondent, a lower riparian proprietor, accustomed to use the water for distilling purposes, was held entitled to prevent a continuation of such pumping.

## SNOW v. PARSONS.

28 Vt. 459. 1856.

ACTION on the case for the obstruction of the plaintiff's water-wheel by the tan-bark discharged at the defendants' tannery on the stream above, and suffered to float down to the plaintiff's mill. The action was referred, and the referee reported the following facts.

The plaintiff was the owner of a saw-mill in West Dover, upon a branch of Deerfield River, together with a privilege of water to operate the same from 1842 to 1845, when he sold them, and from 1849, when he re-purchased, until the commencement of this suit.

In 1844 a tannery was erected upon the same stream, about a mile and three fourths above the plaintiff's saw-mill, and was so situated that the tan vats were directly over the stream, and the spent tan was discharged into the stream, and carried by the water down to and by the plaintiff's saw-mill. On the 4th of October, 1849, the defendants purchased the said tannery, and have ever since continued to own and occupy it, using yearly a large amount of tan-bark, which, after being used, was discharged into the stream and suffered to float down the same. A portion of this tan-bark floated down and lodged in the plaintiff's pond, where it accumulated to considerable extent, and some floated into the flume to the plaintiff's mill, which somewhat incommoded him. Sometimes the tan-bark would accumulate so as to somewhat impede the flow of the water into the flume, but it did not appear that the plaintiff had sustained much inconvenience from that cause, as it was easily removed, and the obstruction did not often occur. The tan-bark accumulated in the plaintiff's pond much more rapidly after the defendants commenced operating the tan works in 1849, and was doubtless owing to the increased quantity of bark used at the tannery; and after October, 1849, portions of it lodged in and upon the plaintiff's saw-mill wheel, whereby the same was impeded and repeatedly stopped, and the plaintiff was thereby subjected to some little delay in operating the mill, and labor in removing the obstruction and getting the wheel in motion. The wheel was of cast iron, and known as the Fergerson reaction wheel, and was so constructed that when tan-bark lodged in it, it was somewhat difficult to remove it, but it might have been altered without impairing its usefulness, and at a small expense, so that the tan-bark would not impede or affect its operations; and prior to 1846 the wheel used was of a different construction, and was not, and would not be obstructed or injuriously affected in any way by the floating down of the tan-bark.

Upon the hearing before the referee the defendants offered to prove that it had been the universal and uniform custom and prac-

tice in all the counties of this state to discharge the spent bark of tanneries into the streams on which they were situated, ever since the country was first settled, and that dam owners situated below on the streams had never, so far as the witnesses knew, disputed the right to do so until now; and that tanneries could not be conducted at any profit without that means of disposing of their spent tan-bark, and that the withholding such use of the streams from tanners would, in the belief of the witnesses, have excluded that branch of industry from this state; and that the same custom and the same practice had uniformly prevailed in all the states and counties of New England, so far as the witnesses had had opportunity of knowing.

To this testimony the plaintiff objected. The defendants admitted that prior to 1844 there was no tannery on this stream. The referee, intending to decide according to law, excluded the testimony offered; and the right of the plaintiff to recover upon the foregoing facts was submitted by the referee to the court; the damages being assessed at forty dollars, if the plaintiff was entitled to recover.

The county court, September Term, 1854, — UNDERWOOD, J., presiding, — rendered judgment, upon the report, for the plaintiff. Exceptions by the defendants.

REDFIELD, CH.J. The important and, as I think, the only question in this case, is whether it is proper for extensive tanneries, upon moderate-sized streams, to expend their refuse, or spent bark, into the stream. In regard to many uses of the water in streams, it has been so long settled by common consent, or is so obvious in itself, that it is determinable, as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some débris or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of saw-dust, to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood, and propelled by water power.

The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit, which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit, which would affect one stream seriously, would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it

do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others.

It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts. In the present case it does not seem to have been treated in that light, unless we regard the judgment of the county court in favor of the plaintiff as determining it. And, as much of the testimony rejected might have had an important bearing upon this question, and no notice is taken of this point either in the report or the judgment, we must suppose it was not the purpose of the county court to decide the case upon that ground. Indeed, the report furnished no adequate materials for such a determination. That portion of the defendants' offer which tended to show that tanneries could not be operated to any useful purpose, without thus disposing of their waste bark, was almost a cardinal point in determining the main question, and, if shown to the extent offered, might justify the court in finally requiring the proprietors below to submit to *some* inconvenience that those above might not be deprived of all benefit of the stream for this kind of manufacture. And the reasonableness of plaintiffs submitting to this inconvenience must depend upon its extent, and the comparative benefit to the defendants, to be judged of by the triers of the facts.

This must be determined upon general principles applicable to the entire business of tanning, and the importance of discharging its waste materials in this mode, and the probable inconvenience of those below. And if, in this view, they regard the use as an unlawful one, then surely the defendants are liable to all damage sustained by the plaintiff, whether he might have used a wheel less liable to such injury or not.

But if the use is fairly to be regarded as a lawful one, then, probably, the plaintiff should have conformed his machinery to the altered circumstances of the stream. And if the defendants' use of the stream is a lawful and allowable one, it will make no difference that the plaintiff's mill was first erected, if it had not been in operation a sufficient length of time to acquire any prescriptive right to use the water in an extraordinary manner. And as the plaintiff's present wheel was put into his mill after the defendants' tannery was in operation, and his other wheel would not have been unfavor-

ably affected by bark, nothing, by way of prescription or license, or prior occupancy, can probably be claimed.

And upon the question of the reasonableness of the defendants' use of the stream, it seems to me the uniform custom of the country for generations would be of some significance in determining its reasonableness. A uniform general custom upon this subject ought, upon general principles, to have a controlling force. We think, therefore, the case should go back to be determined, upon the question of fact, of the reasonableness of the use by the defendants: 1st, upon general grounds; 2d, the peculiar facts, if any, affecting the reasonableness of the use in this particular case.

In regard to the usage in the country as to tanneries for generations, without controversy, if shown as offered to be, and if it is all one way, it would have almost the force of law. For all the cases which we have, where reasonable care and diligence can be determined as questions of law, without going to the jury, have grown up out of the practice of particular classes of persons, which, becoming settled and uniform, and known to all, is declared by the court as a rule of law; which, while it was uncertain, was matter of fact to be determined by the jury. A familiar instance of this is the demanding payment, and giving notice of dishonor of bills and notes, which is now fixed to the day the note or bill becomes due, and giving notice by the mail of the next day. Formerly this was submitted to a jury of merchants, who determined the reasonableness of demand and notice upon the particular facts in the case, with reference to the more common usage of merchants.

So, too, in this particular business, if the court were tanners, we might be able to say that bark must, of necessity, be spent in the stream in order to carry on the work at all, or that, in fact, the bark did not essentially injure the proprietors below, or we might know the contrary of both propositions. But not being such, it seems to us as much matter of fact as any other question of reasonable care and diligence.

It is settled law, that every riparian proprietor may use the water for purposes of manufacture, but so use it as not unnecessarily to abridge the use to others; *i.e.*, every such proprietor may use it with care and prudence. What care and prudence is, in such case, must depend upon the facts of each case, the conclusion to be drawn by the triers of the fact. And to assist them in making this conclusion, if they are not themselves experts in the business, they are entitled to have the experience and wisdom of such as are experts, to enable them to judge of the reasonableness of the particular use.

The measure of reasonable care and prudence in such cases is that which prudent and careful men exercise in the management of their own business. And how are we to know this without proof, in those departments of business with which we are not familiar?

Proof that all prudent and careful men, in the management of this business, pursued a given course, and that others acquiesced in that course, without objection, would seem to be of the very essence of the inquiry before the jury, in such cases.

*Judgment reversed, and case remanded.*

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ATCHISON v. PETERSON.

20 Wall. (U.S.) 507. 1874.

MR. JUSTICE FIELD delivered the opinion of the court.

By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the Government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the centre of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate. And as all such owners on the same stream have an equality of right to the use of the water, as it naturally flows, in quality and without diminution in quantity, except so far as such diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes, there could not be, according to that law, any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor could the water by one owner be so retarded in its flow as to be thrown back to the injury of another owner above him. "It is wholly immaterial," says Mr. Justice STORY, in *Tyler v. Wilkinson*, 4 Mason, 379, "whether the party be a proprietor above or below in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to the proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all." "Every proprietor of lands on the banks of a river," says Kent,

"has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat*. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of the water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled doctrine on the subject, and all the difficulty which arises consists in the application." 3 Kent's Commentaries, 439, side paging.

This equality of right among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the Government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The Government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories. In *Irwin v. Phillips*, 5 California, 140, a case decided by the Supreme Court of California in January, 1855, this subject was considered. After stating that a system of rules had been permitted to grow up with respect to mining on the public lands by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region had been tacitly assented to by the Federal Government, and heartily encouraged by the expressed legislative policy of the State, the court said: "If there are, as must be admitted, many things connected

with this system which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers."

This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. The act granting the right of way to ditch and canal owners over the public lands, and for other purposes, passed on the 26th of July of that year, in its ninth section declares "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 14 Stat. at Large, 253.

The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right; that is subject to the same limitations, whatever the use. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it, after its diversion, to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality, where such deterioration does not defeat nor impair the uses to which the water is applied.

Such was the purport of the ruling of the Supreme Court of California in *Butte Canal and Ditch Company v. Vaughn*, 11 California, 143, where it was held that the first appropriator had only the right to insist that the water should be subject to his use and enjoyment to the extent of his original appropriation, and that its quality should not be impaired so as to defeat the purpose of that appropriation. To this extent, said the court, his rights go and no farther; and that in subordination to them subsequent appropriators may use the



channel and waters of the stream, and mingle with its waters other waters, and divert them as often as they choose; that whilst enjoying his original rights the first appropriator had no cause of complaint. In the subsequent case of *Ortman v. Dixon*, 13 California, 33 (see also *Lobdell v. Simpson*, 2 Nevada, 274), the same court held to the same purport, that the measure of the right of the first appropriator of the water as to extent follows the nature of the appropriation or the uses for which it is taken.

What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. A slight deterioration in quality might render the water unfit for drink or domestic purposes, whilst it would not sensibly impair its value for mining or irrigation. In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction.

If, now, we apply the principles thus stated to the present case, the question involved will be of easy solution. It appears from the evidence that there is at the point where the defendants work their mining claims only about two hundred inches of water in the creek, according to miners' measurement; that between that point and the point where the Helena ditch taps the creek the distance is about fifteen miles; and that between those points the creek is supplied by several tributary streams of clear water, so that at the point where the water is diverted its volume amounts to about fifteen hundred inches. Of this water the Helena ditch diverts five hundred inches, and conveys it nearly eighteen miles to the localities where it is sold. Running water has a tendency to clear itself, and that result is often produced by a flow of a few miles. But in this case the evidence shows that the water as it enters the Helena ditch is muddied and to some extent is affected by sand. At the same time there is a great preponderance in the evidence to the effect that the deterioration in quality from this circumstance is very slight and does not render the water to any appreciable extent less useful or salable for mining purposes at the localities to which it is con-

veyed; and that no additional labor is required on the ditch on account of the muddied condition of the water. There is also much doubt left by the evidence whether the sand carried into the ditch does not to a very great extent come from the hillsides lying between it and the mining of the defendants, or lying along the course of the ditch. A sand-gate at the head of the ditch is necessary, whether there is or is not mining on the stream above; and the accumulation of sand from all sources, from the hillsides as well as from the mining of the defendants, only requires the additional labor of one person for a few minutes each day. The injury thus sustained, and which is only to a limited extent attributable to the mining of the defendants, if at all, is hardly appreciable in comparison with the damage which would result to the defendants from the indefinite suspension of work on their valuable mining claims. The defendants are also responsible parties, capable, according to the evidence, of answering for any damages which their mining produces, if any, to the plaintiffs. Under these circumstances we think there was no error in the refusal of the court below to interfere by injunction to restrain their operations, and in leaving the plaintiffs to their remedy, if any, by an action at law.

With respect to the water diverted by the Yaw-Yaw ditch, it is shown that its deterioration, so far as the deterioration exceeds that of the water in the Helena ditch, is caused by sand and sediment brought by a tributary which enters the creek below the head of the Helena ditch.

*Decree affirmed.*

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WEBB v. PORTLAND MFG. CO.

3 Sum. (U.S. C.C.) 189. 1838.

THE plaintiff was the owner of land, upon the river Presumpscut, upon which mills had been erected. The defendants, by a canal, withdrew some of the water from the river. The defendants maintained that this withdrawal of the water did no actual damage to the plaintiff.

STORY, J. I can very well understand, that no action lies in a case where there is *damnum absque injuria*, that is, where there is a damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand, how it can correctly be said, in a legal sense, that an action will not lie, even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the

very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages. *A fortiori*, this doctrine applies, where there is not only a violation of a right of the plaintiff; but the act of the defendant, if continued, may become the foundation, by lapse of time, of an adverse right in the defendant; for then it assumes the character, not merely of a violation of a right, tending to diminish its value, but it goes to the absolute destruction and extinguishment of it. Under such circumstances, unless the party injured can protect his right from such a violation by an action, it is plain that it may be lost or destroyed, without any possible remedial redress. In my judgment the common law countenances no such inconsistency, not to call it by a stronger name. Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the party injured is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.

Let us come, then, to the only remaining question in the cause; and that is, whether any right of the plaintiff, as mill-owner on the lower dam, is or will be violated by the diversion of the water by the canal of the defendants. And, here, it does not seem to me, that, upon the present state of the law, there is any real ground for controversy, although there were formerly many vexed questions and much contrariety of opinion. The true doctrine is laid down in *Wright v. Howard*, 1 Sim. & Stu. R. 190, by Sir JOHN LEACH, in regard to riparian proprietors, and his opinion has since been deliberately adopted by the King's Bench. "*Prima facie* (says that learned judge), the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right, either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years, which term of twenty years is now adopted upon a principle of general convenience, as affording conclusive presumption of a grant." The same

doctrine was fully recognised and acted upon in the case of *Tyler v. Wilkinson*, 4 Mason R. 397, 400, 401, 402; and also in the case of *Blanchard v. Baker*, 8 Greenl. R. 253, 266. In the latter case the learned judge (Mr. Justice WESTON), who delivered the opinion of the court, used the following emphatic language: "The right to the use of a stream is incident or appurtenant to the land through which it passes. It is an ancient and well-established principle, that it cannot be lawfully diverted, unless it is returned again to its accustomed channel, before it passes the land of a proprietor below. Running water is not susceptible of an appropriation, which will justify the diversion or unreasonable detention of it. The proprietor of the water-course has a right to avail himself of its momentum as a power, which may be turned to beneficial purposes." Mr. Chancellor Kent has also summed up the same doctrine, with his usual accuracy, in the brief, but pregnant, text of his Commentaries (3 Kent's Comm. Lect. 42, p. 439, 3d edit.); and I scarcely know where else it can be found reduced to so elegant and satisfactory a formulary. In the old books, the doctrine is quaintly though clearly stated; for it is said, that a water-course begins *ex jure naturae*, and having taken a certain course naturally, it cannot be [lawfully] diverted. *Aqua currit, et debet currere, ut currere solebat*.

The same principle applies to the owners of mills on a stream. They have an undoubted right to the flow of the water, as it has been accustomed of right and naturally to flow to their respective mills. The proprietor above has no right to divert, or unreasonably to retard this natural flow to the mills below; and no proprietor below has a right to retard or turn it back upon the mills above, to the prejudice of the right of the proprietors thereof. This is clearly established by the authorities already cited; the only distinction between them being, that the right of a riparian proprietor arises by mere operation of law, as an incident to his ownership of the bank; and that of a mill-owner, as an incident to his mill. *Bealey v. Shaw*, 6 East R. 208; *Saunders v. Newman*, 1 B. & Ald. R. 258; *Mason v. Hill*, 3 B. & Adolph. R. 304; s.c. 5 B. & Adolph. 1; *Blanchard v. Baker*, 8 Greenl. R. 253, 268; and *Tyler v. Wilkinson*, 4 Mason R. 397, 400 to 405, are fully in point. Mr. Chancellor Kent, in his Commentaries, relies on the same principles, and fully supports them by a large survey of the authorities. 3 Kent Comm. Lect. 52, pp. 441 to 445, 3d edit.

Now, if this be the law on this subject, upon what ground can the defendants insist upon a diversion of the natural stream from the plaintiff's mills, as it has been of right accustomed to flow thereto? First, it is said, that there is no perceptible damage done to the plaintiff. That suggestion has been already in part answered. If it were true, it could not authorize a diversion, because it impairs the right of the plaintiff to the full, natural flow of the stream; and may be-

come the foundation of an adverse right in the defendants. In such a case, actual damage is not necessary to be established in proof. The law presumes it. The act imports damage to the right, if damage be necessary. Such a case is wholly distinguishable from a mere fugitive, temporary trespass, by diverting or withdrawing the water a short period, without damage, and without any pretence of right. In such a case the wrong, if there be no sensible damage and it be transient in its nature and character, as it does not touch the right, may possibly (for I give no opinion upon such a case) be without redress at law; and certainly it would found no ground for the interposition of a court of equity by way of injunction.

But I confess myself wholly unable to comprehend, how it can be assumed, in a case like the present, that there is not and cannot be an actual damage to the right of the plaintiff. What is that right? It is the right of having the water flow in its natural current at all times of the year to the plaintiff's mills. Now, the value of the mill privileges must essentially depend, not merely upon the velocity of the stream, but upon the head of water which is permanently maintained. The necessary result of lowering the head of water permanently would seem, therefore, to be a direct diminution of the value of the privileges. And if so, to that extent it must be an actual damage.

NOTE. — It has often been held, or said, that nominal damages may be given for a diversion of water, accustomed to flow over the land of the plaintiff, without proof that such diversion caused damage to the plaintiff. See *North Alabama Ry. Co. v. Jones*, 156 Ala. 360; *Moore v. Clear Lake Water Works*, 68 Cal. 146; *Hendrick v. Cook*, 4 Ga. 241, 247; *Tillotson v. Smith*, 32 N.H. 90; *Roberts v. Guyfrai District Council*, [1899] 1 Ch. 583.

In *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 16 Pick. (Mass.) 241, it was held that, if A for twenty years diverts water accustomed to flow over the land of B, A acquires a prescriptive right to make such diversion, even though the diversion had not caused any damage to B during the twenty years. WILDE, J., said (p. 247): "But if the defendants did not suffer any actual damage, it would be of no importance in this case; for the plaintiffs' claim was adverse to theirs, and they might have maintained an action without proof of actual damages, if the plaintiffs had no right to divert the water. The law presumes damage when a man's right is invaded, and if one suffers his rights to be invaded, and acquiesces in an adverse claim for more than twenty years, it is quite unimportant whether he suffers any actual damages or not."

The student should compare this doctrine with the doctrine of *Smith v. Thackerah*, L. R. 1 C. P. 564, *supra*, and *Sturges v. Bridgman*, L. R. 11 Ch. D. 852, *supra*.

If the courts held that the plaintiff had no cause of action until he suffered actual damage from the acts of the defendant, there would be no danger of the defendant's acquiring a prescriptive right through the plaintiff's acquiescence in acts which did him no damage. Until there is a cause of action, the prescriptive period does not begin to run. The doctrine that a cause of action should be given to the plaintiff when he has suffered no actual damage, in order to prevent the establishment of a prescriptive right against him, will not, it is submitted, stand analysis.

See *Last Chance Water Ditch Co. v. Heilbron*, 86 Cal. 1, 20; *Holsman v. Boiling Spring Bleaching Co.*, 1 McCarter (N.J.) 335, 345; *Norton v. Volentine*, 14 Vt. 239, 245.

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### MCCORMICK v. HORAN.

81 N.Y. 86. 1880.

THIS action was brought to restrain defendant from obstructing the flow of water in a water-course running from the lands of plaintiffs on to and across the lands of defendant below, and to compel him to remove obstructions placed by him in the stream.

The facts found were substantially these: Plaintiffs operated a quarry upon their lands near said water-course, which started from a spring upon plaintiffs' lands. After the lands were cleared up over which the stream passed, and many years prior to the acts complained of, the owners, in order to direct and control the flow of the water in the stream, dug ditches and confined the flow therein; plaintiffs dug such a ditch on their lands, following the general course of the natural stream to the boundary line of their lands and those of defendant adjoining. This ditch was continued by the then owner of defendant's premises across the same. This ditch was from time to time changed and improved, and when defendant went into possession the ditch across his lands was walled up and covered over. The ditch was capable of holding all the water that ran in the stream except in cases of high water. Plaintiffs worked their quarry during the summer season, and had at the time of the occurrence in question excavated above three-fourths of an acre to a depth of from five to twelve feet. Small water-courses were cut in the progress of the excavation; the water therefrom ran into the bed of the quarry; in the winter the snows drifted into the quarry and melted; in the spring the surface waters from the surrounding lands also flowed into it. The waters so accumulating in said quarry, if it had not been excavated, would naturally descend and flow into said water-course. In the spring of each year plaintiffs pumped the water from the quarry into said water-course. The court found that the flow

of water while the pumps are at work is increased in amount, but that the flow is no greater than in the earlier spring months, and that the capacity of the water-course as it runs in said ditch is ample to carry off all the water pumped therein at any time, together with the other water running therein. In May, 1876, and before plaintiffs had begun to pump the water from their quarry, defendant took up the stone covering of the ditch upon his land, filled it with earth and stone so as to prevent the flow of water therein and built a dam across said water-course near the line between his and plaintiffs' land, which prevented the flow of any water therein until the water had risen to the top of said dam, thereby causing the water to set back into and to fill up plaintiffs' quarry and to overflow their adjoining lands.

ANDREWS, J. Water-courses are the means which nature has provided for the drainage of the country through which they pass, and from the natural servitude of lands upon a water-course to receive the waters flowing therein from the lands above, springs the right of the owner of the superior heritage to have the water from his lands, of which the water-course is the natural outlet, drained into and carried off thereby, and the duty of the owner of the inferior and servient tenement not to interfere with or obstruct its passage. But the right to the use of a water-course for the discharge of surface or other waters exists only in respect of waters of which the water-course is the natural outlet, and it does not justify the diversion and turning of the water of one stream into another, not its natural channel, thereby subjecting lands on the stream into which the diversion is made to the servitude or easement of a water-way for the water thus discharged into it. This is the principle upon which several of the cases to which the appellant refers were decided, and they have no application to the case before us. *Merritt v. Parker*, 1 N.J. 460; *Tillotson v. Smith*, 32 N.H. 90; *Mayor, etc., of Baltimore v. Appold*, 42 Md. 442.

The right of an owner of lands, through which a water-course runs, to have the same kept open, and to discharge therein the surface water, which naturally flows thereto, is not however limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was in a state of nature, and unchanged by cultivation or improvements. The owner of lands drained by a water-course may change and control the natural flow of the surface water therein, and by ditches or otherwise accelerate the flow, or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor. *Waffle v. N. Y. C. R.R. Co.*, 53 N.Y. 11; *Miller v. Laubach*, 47 Pa. St. 154. This right is subject to the qualification that one owner cannot, by artificial arrangements on his land, concentrate and discharge into

the stream surface water, in quantities beyond the natural capacity of the stream to the damage of other owners. *Noonan v. City of Albany*, 79 N.Y. 470. The interests of society are promoted by the cultivation and improvement of the soil, the working of mines, and by other industries connected with the use of land; and the rule of law does not prevent the use of water-courses for artificial drainage, although the volume of the stream is thereby somewhat enlarged, and the water is discharged at a different time or manner from what it would be if the land was kept in a state of nature, provided no material injury is occasioned to other riparian owners. These views are decisive of this case. The plaintiffs, in opening the quarry on their premises, were exercising a lawful right. The excavation made formed a reservoir into which the surface water from the contiguous lands collected, and in the spring, when the plaintiffs commenced their operations, they pumped this water, together with that arising from the melting snows, and what came from the small water-courses cut off by the excavation, into the water-course, which lower down crossed the defendant's farm.

The court found that this water, if the excavation had not been made, would have naturally descended and flowed into the stream, and that although the flow of water when the pumping was going on was greater than it otherwise would have been, the natural capacity of the water-course was sufficient to carry off the water pumped into it, together with the other water running in the stream, and there was no finding that the defendant sustained any damage from the acts of the plaintiffs.

Under these circumstances, the act of the defendant, in filling up the channel and obstructing the flow of the water, was unlawful, and the judgment should therefore be affirmed.

All concur except DANFORTH, J., taking no part, having been of counsel.

*Judgment affirmed.*

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NININGER v. NORWOOD.

72 Ala. 277. 1882.

BRICKELL, C.J. The original bill was filed by Mrs. Mary R. Norwood, a married woman, owning a plantation, partly as a statutory and partly as an equitable separate estate, to enjoin the defendants, who own an adjoining plantation, from continuing thereon levees, or embankments, causing waters to flow back upon the lands of the complainant, which, following their natural outlet, had always flowed therefrom over the lands of the defendants. The material averments of the bill are: That a stream, known as "Lake Creek," runs through the plantation of Mrs. Norwood. In times of heavy



rains, large quantities of water escaping over the banks of this stream, upon the lands of complainant, with the accumulations of rain-water, have a natural outlet therefrom over the lands of the defendants. To prevent these waters from flowing over and flooding their lands, the defendants have erected embankments, or levees, which cause them to flow back and accumulate upon the lands of the complainant, rendering them less fit for cultivation, and in other respects injuring them.

The remaining, and more important, question involved in the demurrer to the bill, is the existence of the right asserted by the complainant. Whether, as the owner of the land upon which the waters escaping from the creek in times when it is swollen by heavy rains, with the waters accumulating by the fall of rain, the complainant has a natural easement in the lands of the defendants, to the extent of the natural flow of these waters from her land, to and upon the lands of the defendants, is the controlling, decisive question. In *Hughes v. Anderson*, 68 Ala. 280, we considered the right of the owner of an upper parcel of lands to collect and concentrate the waters falling or originating upon his lands, increasing the flow, and discharging them in greater volumes upon the lower parcel. Following the case of *Kauffman v. Griesemer*, 26 Penn. St. 407, we held, that the owner of the upper or superior heritage had not the right to create new channels for the water falling or originating upon his lands, but that he could improve his lands, though the volume of water discharged by its accustomed channels was thereby increased. There are many interesting questions of growing importance, connected with the general subject of the rights of adjoining proprietors as to water falling or originating upon lands, but we confine our consideration to the single question the case presents.

The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the waters cannot be interrupted or prevented by the servient owner, to the detriment or injury of the estate of the dominant or any other proprietor. The doctrine is repudiated in some of the American courts, and it is asserted that the doctrine of the common law is, that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground as to mere surface water; and that the owner of the inferior or lower estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and, in so doing, may turn the same back upon, or off, or to, or over the lands of other proprietors, without liability for injuries occurring from such obstruction or diversion. 3 Wait's Actions and Defenses,

711; Angell on Water-Courses, §§ 108 *et seq.* (7th ed.) In England, the rule seems firmly adhered to, that lands are burdened with the servitude of receiving and discharging all waters that naturally flow down to them from the lands of an adjoining proprietor upon a higher level. Any interference with, or obstruction of the servitude by the lower owner, to the injury of the owner of the dominant estates, subjects him to liability for the resulting damage. Wood on Nuisances, 422. This rule, with an exception, *perhaps*, as to town or city lots, is followed generally in this country. *Gillham v. Madison R.R. Co.*, 49 Ill. 484; *Adams v. Walker*, 34 Conn. 466; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Miller v. Laubach*, 47 Ib. 154; *Ogburn v. Conner*, 46 Cal. 346; *Butler v. Peck*, 16 Ohio St. 334; *Watts v. Clifton*, 22 Ib. 247; *Swett v. Cutts*, 50 N.H. 439.

In the very carefully considered case of *Butler v. Peck*, said BRINKERHOFF, J., "The principle seems to be established and indisputable, that when two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a *servitude* to the upper, to receive the water which *naturally* runs from it, providing the industry of man has not been used to *create the servitude*. Or, in other words more familiar to the students of the common law, the owner of the upper parcel of land has a *natural easement* in the lower parcel, to the extent of the natural flow of water from the upper parcel to and upon the lower." And again it was said: "The natural easement arises out of the relative altitudes of adjacent *surfaces* as nature made them, and these altitudes may not be artificially changed to the damage of an adjacent proprietor." In *Martin v. Riddle*, reported in a note to *Kauffman v. Griesemer*, *supra*, it is said by LOWRIE, J.: "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances; hence the owner of the lower ground has no right to erect embankments, whereby the natural flow of the water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains, by which the flow of water is diverted from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the waste upon the lower fields." And in the case of *Kauffman v. Griesemer*, WOODWARD, J., said: "Almost the whole law of water-courses is founded in the maxim of the common law, *Aqua currit, et debet currere*. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement, for the discharge of all waters which by nature rise in, or flow or fall upon the superior."

These parties, complainant and defendants, acquired the lands with full knowledge of their natural relations, and that from the one parcel, because of its altitude, and because water is in its nature descendible, the bursts of water from the creek in freshets, and the accumulations of rainwater, had and found a natural outlet over the immediately adjacent lower lands. Whatever of advantage to the one, or of inconvenience to the other, resulted from the natural formation of the lands, entered into the consideration of the acquisition; and there can be no justice in suffering one party to increase his advantages, or to lessen his inconveniences, at the expense and to the injury of the other. There cannot be interminable contests between them as to the lessening or increasing the burdens nature has imposed. Either may improve his own parcel, so long as he keeps within a just application of the maxim, *Sic utere tuo, ut laedas non alienum*. The demurrer to the bill was not well taken, and was properly overruled.

NOTE. — See *McDaniel v. Cummings*, 83 Cal. 515; *Gillham v. Madison County R.R. Co.*, 49 Ill. 484; *Foley v. Godchaux*, 48 La. 466; *Baltimore R.R. Co. v. Hackett*, 87 Md. 224; *Boyd v. Conklin*, 54 Mich. 583; *Porter v. Durham*, 74 N.C. 767; *Butler v. Peck*, 16 Ohio St. 334; *Kauffman v. Griesemer*, 26 Pa. 407; *McGehee v. Tidewater Ry. Co.*, 108 Va. 508.

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### BARKLEY v. WILCOX.

86 N.Y. 140. 1881.

ANDREWS, J. This is not the case of a natural water-course. A natural water-course is a natural stream, flowing in a defined bed or channel, with banks and sides, having permanent sources of supply. It is not essential, to constitute a water-course, that the flow should be uniform or uninterrupted. The other elements existing, a stream does not lose the character of a natural water-course, because in times of drought the flow may be diminished or temporarily suspended. It is sufficient if it is usually a stream of running water. Angell, *Water-Courses*, § 4; *Luther v. The Winnisimmet Co.*, 9 Cush. 171.

The parties in this case own adjacent lots on a street near a village, but not within the corporate limits. The findings are, that the natural formation of the land was such that surface water from rains and melting snows would descend from different directions, and accumulate in the street in front of the plaintiff's lot, in varying quantities according to the nature of the seasons, sometimes extending quite back upon the plaintiff's lot; that in times of unusual

amount of rain, or thawing snow, such accumulations, before the grading of the defendant's lot, were accustomed to run off over a natural depression in the surface of the land across the defendant's lot, and thence over the lands of others, to the Neversink River; that when the amount of water was small, it would soak away in the ground; that in 1871 the defendant built a house on his lot, and used the earth excavated in digging the cellar to improve and better the condition of his lot, by grading and filling up the lot and sidewalk in front of it about twelve inches, and on a subsequent occasion he filled in several inches more; that in the spring of 1875, there was an unusually large accumulation of water from melting snow and rains in front of and about the plaintiff's premises, so that the water ran into the cellar of his house, and occasioned serious damage; that the filling in of the defendant's lot had the effect to increase the accumulation of water on the plaintiff's lot, and contributed to the injury to his property.

There was no natural water-course over the defendant's lot. The surface water, by reason of the natural features of the ground and the force of gravity, when it accumulated beyond a certain amount in front of the plaintiff's lot, passed upon and over the lot of the defendant. The discharge was not constant or usual, but occasional only. There was no channel or stream, in the usual sense of those terms. In an undulating country, there must always be valleys and depressions, to which water, from rains or snow, will find its way from the hillsides, and be finally discharged into some natural outlet. But this does not constitute such valleys or depressions, water-courses. Whether, when the premises of adjoining owners are so situated that surface water falling upon one tenement naturally descends to and passes over the other, the incidents of a water-course apply to and govern the rights of the respective parties, so that the owner of the lower tenement may not, even in good faith and for the purpose of improving or building upon his own land, obstruct the flow of such water to the injury of the owner above, is the question to be determined in this case. This question does not seem to have been authoritatively decided in this State. It was referred to by DENIO, Ch.J., in *Goodale v. Tuttle*, 29 N.Y. 467, where he said: "And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule, that the owner of land has full dominion over the whole space above and below the surface." The case in which these observations were made did not call for the decision of the question, but they show the opinion of a great judge upon the point now in judgment. Similar views have been expressed

in subsequent cases in this court, although in none of them, it seems, was the question before the court for decision. *Vanderwiele v. Taylor*, 65 N.Y. 341; *Lynch v. The Mayor*, 76 *id.* 60. The question has been considered by courts in other States, and has been decided in different ways. In some, the doctrine of the civil law has been adopted as the rule of decision. By that law, the right of drainage of surface waters, as between owners of adjacent lands of different elevations, is governed by the law of nature. The lower proprietor is bound to receive the waters which naturally flow from the estate above, provided the industry of man has not created or increased the servitude. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; Domat [Cush. ed.] 616; Code Napoleon, art. 640; Code Louisiana, art. 656. The courts of Pennsylvania, Illinois, California, and Louisiana have adopted this rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Martin v. Riddle*, 26 Penn. St. 415; *Kauffman v. Griesemer*, *id.* 407; *Gillham v. Madison Co. R.R. Co.*, 49 Ill. 484; *Gormley v. Sanford*, 52 *id.* 158; *Ogburn v. Connor*, 46 Cal. 346; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Butler v. Peck*, 16 Ohio St. 334; *Laumier v. Francis*, 23 Mo. 181. On the other hand, the courts of Massachusetts, New Jersey, New Hampshire, and Wisconsin have rejected the doctrine of the civil law, and hold that the relation of dominant and servient tenements does not by the common law apply between adjoining lands of different owners, so as to give the upper proprietor the legal right, as an incident of his estate, to have the surface water falling on his land discharged over the land of the lower proprietor, although it naturally finds its way there; and that the lower proprietor may lawfully, for the improvement of his estate and in the course of good husbandry, or to make erections thereon, fill up the low places on his land, although by so doing he obstructs, or prevents, the surface water from passing thereon from the premises above, to the injury of the upper proprietor. *Luther v. The Winnisimmet Co.*, 9 Cush. 171; *Parks v. Newburyport*, 10 Gray, 28; *Dickinson v. Worcester*, 7 Allen, 19; *Gannon v. Hargadon*, 10 *id.* 106; *Bowlsby v. Speer*, 2 Vroom, 351; *Pettigrew v. Evansville*, 25 Wis. 223; *Hoyt v. Hudson*, 27 *id.* 656; *Swett v. Cutts*, 50 N.H. 439. It may be observed that in Pennsylvania, house lots in towns and cities seem to be regarded as not subject to the rule declared in the other cases in that State, in respect to surface drainage. *Bentz v. Armstrong*, 8 Watts & S. 40. And in *Livingston v. McDonald*, 21 Iowa, 160, the court, in an opinion by DILLON, J., after stating the civil law doctrine, say, that it may be doubted whether it will be adopted by the common-law courts of this country, so far as to preclude the lower owner from making in good faith improvements, which would have the effect to prevent the water of the upper estate from flowing or passing away. Professor Washburn states that the prevailing doctrine seems to be that if for the purposes of improving and culti-

vating his land, a land-owner raises or fills it, so that the water which falls in rain or snow upon an adjacent owner's land, and which formerly flowed on to the first mentioned parcel, is prevented from so doing, to the injury of the adjacent parcel, the owner of the latter is without remedy, since the other party has done no more than he had a legal right to do. Wash. on Easements [2d ed.] 431.

Upon this state of the authorities, we are at liberty to adopt such rule on the subject as we may deem most consonant with the demands of justice, having in view on the one hand individual rights, and on the other the interests of society at large. Upon consideration of the question, we are of opinion that the rule stated by DENIO, Ch.J., in *Goodale v. Tuttle*, is the one best adapted to our condition, and accords with public policy, while at the same time it does not deprive the owner of the upper tenement of any legal right of property. The maxim, *aqua currit et debet currere ut currere solebat*, expresses the general law which governs the rights of owners of property on water-courses. The owners of land on a water-course are not owners of the water which flows in it. But each owner is entitled, by virtue of his ownership of the soil, to the reasonable use of the water as it passes his premises, for domestic and other uses, not inconsistent with a like reasonable use of the stream by owners above and below him. Such use is incident to his right of property in the soil. But he cannot divert, or unreasonably obstruct the passage of the water, to the injury of other proprietors. These familiar principles are founded upon the most obvious dictates of natural justice and public policy. The existence of streams is a permanent provision of nature, open to observation by every purchaser of land through which they pass. The multiplied uses to which in civilized society the water of rivers and streams is applied, and the wide injury which may result from an unreasonable interference with the order of nature, forbid an exclusive appropriation by any individual, of the water in a natural water-course, or any unreasonable interruption in the flow. It is said, that the same principle of following the order of nature should be applied between coterminous proprietors, in determining the right of mere surface drainage. But it is to be observed, that the law has always recognized a wide distinction between the right of an owner to deal with surface water falling or collecting on his land, and his right in the water of a natural water-course. In such water, before it leaves his land and becomes part of a definite water-course, the owner of the land is deemed to have an absolute property, and he may appropriate it to his exclusive use, or get rid of it in any way he can, provided only that he does not cast it by drains, or ditches, upon the land of his neighbor; and he may do this, although by so doing he prevents the water reaching a natural water-course, as it formerly did, thereby occasioning injury to mill-owners or other proprietors on the stream. So also he may, by

digging on his own land, intercept the percolating waters which supply his neighbor's spring. Such consequential injury gives no right of action. *Acton v. Blundell*, 12 M. & W. 324; *Rawstron v. Taylor*, 11 Exch. 369; *Phelps v. Nowlen*, 72 N.Y. 39. Now in these cases there is an interference with natural laws. But those laws are to be construed in connection with social laws and the laws of property. The interference in these cases with natural laws is justified, because the general law of society is, that the owner of land has full dominion over what is above, upon or below the surface, and the owner in doing the acts supposed is exercising merely a legal right. The owner of wet and spongy land cannot, it is true, by drains or other artificial means, collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law. Corp. Jur. Civ. 39, tit. 3, §§ 2, 3, 4, 5; *Noonan v. City of Albany*, 79 N.Y. 475; *Miller v. Laubach*, 47 Penn. St. 154. But it does not follow, we think, that the owner of land, which is so situated that the surface waters from the lands above naturally descend upon and pass over it, may not in good faith, and for the purpose of building upon or improving his land, fill or grade it, although thereby the water is prevented from reaching it, and is retained upon the lands above. There is a manifest distinction between casting water upon another's land and preventing the flow of surface water upon your own. Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage, would, we think, place undue restriction upon industry, and enterprise, and the control by an owner of his property. Of course in some cases the opposite principle may cause injury to the upper proprietor. But the question should, we think, be determined largely upon considerations of public policy and general utility. Which rule will, on the whole, best subserve the public interests, and is most reasonable in practice? For the reasons stated, we think the rule of the civil law should not be adopted in this State. The case before us is an illustration of the impolicy of following it. Several house lots (substantially village lots) are crossed by the depression. They must remain unimproved, if the right claimed by the plaintiff exists. It is better, we think, to establish a rule which will permit the reclamation and improvement of low and waste lands, to one which will impose upon them a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors. We do not intend to say, that there may not be cases which, owing to special conditions, and circumstances, should be exceptions to the general rule declared. But this case is within it, and we think the judgment below should be affirmed.

All concur.

*Judgment affirmed.*

NOTE. — See *Jackson v. Keller*, 95 Ark. 242; *Chadeayne v. Robinson*, 55 Conn. 345; *Benthall v. Seifert*, 77 Ind. 302; *Paola v. Garman*, 80 Kan. 702; *Bangor v. Lansil*, 51 Me. 521; *Gannon v. Hargadon*, 10 All. (Mass.) 106; *Rowe v. St. Paul Ry. Co.*, 41 Minn. 384; *Coz v. Hannibal R.R. Co.*, 174 Mo. 588; *Arthur v. Glover*, 82 Neb. 528; *Franklin v. Durgee*, 71 N.H. 186; *Jessup v. Bamford Co.*, 66 N.J.L. 641; *Chicago Ry. Co. v. Groves*, 20 Okl. 101; *Lawton v. South Bound R.R. Co.*, 61 S.C. 548; *Beard v. Murphy*, 37 Vt. 99; *Cass v. Dicks*, 14 Wash. 75; *Hoyt v. Hudson*, 27 Wis. 656; *Walker v. New Mexico R.R. Co.*, 165 U.S. 593.

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ACTON v. BLUNDELL.

12 M. & W. 324. 1843.

TINDAL, C.J. The question raised before us on this bill of exceptions is one of equal novelty and importance. The plaintiff below, who is also the plaintiff in error, in his action on the case declared in the first count for the disturbance of his right to the water of certain underground springs, streams, and watercourses, which, as he alleged, ought of right to run, flow, and percolate into the closes of the plaintiff, for supplying certain mills with water; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff, by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit, and enjoyment of the water of the said spring or well for the convenient use of his close. The defendants by their pleas traversed the rights in the manner alleged in those counts respectively. At the trial the plaintiff proved, that, within twenty years before the commencement of the suit, viz. in the latter end of 1821, a former owner and occupier of certain land and a cotton-mill, now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill; and that the defendants, in the year 1837, had sunk a coal-pit in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that, by the first, the supply of water was considerably diminished, and by the second was rendered altogether insufficient for the purposes of the mill. The learned judge before whom the cause was tried directed the jury, that, if the defendants had proceeded and acted in the usual and proper manner on the land, for the purpose of working and winning a coal-mine therein, they might lawfully do so, and that the plaintiff's evidence was not sufficient to support the allegations in his declaration as traversed by the second and third pleas. Against this direction of the judge the



counsel for the plaintiff tendered the bill of exceptions which has been argued before us. And after hearing such argument, and consideration of the case, we are of opinion that the direction of the learned judge was correct in point of law.

The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface.

The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that, neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above. The law is laid down in those precise terms by the Court of King's Bench in the case of *Mason v. Hill*, 5 B. & Ad. 1; 2 Nev. & M. 747; and substantially is declared by the vice-chancellor in the case of *Wright v. Howard*, 1 S. & S. 190, and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal-pits, and the direction given by the learned judge would be wrong.

But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued — in ordinary cases, indeed, time out of mind — and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and what has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages,

or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of Fleta and of Blackstone), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice STORY, in his judgment in the case of *Tyler v. Wilkinson*, in the courts of the United States, 4 Mason's (American) Reports, 401, as "an incident to the land; and that whoever seeks to found an exclusive use must establish a right-ful appropriation in some manner known and admitted by the law." But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface: no man can tell what changes these underground sources have undergone in the progress of time: it may well be, that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well: again, no proprietor knows what portion of water is taken from beneath his own soil: how much he gives originally, or how much he transmits only, or how much he receives: on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well, there can be no ground for implying any mutual consent or agreement, for ages past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface: he receives as much from his higher neighbour as he sends down to his neighbour below: he is neither better nor worse: the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil: and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purposes of mining, and

discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment to the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking-place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined: in the present case, the nearest coal-pit is at the distance of half a mile from the well: it is obvious the law must equally apply if there is an interval of many miles.

Considering, therefore, the state of circumstances upon which the law is grounded in the one case to be entirely dissimilar from those which exist in the other; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.

No case has been cited on either side bearing directly on the subject in dispute. The case of *Cooper v. Barber*, 5 Taunt. 99, which approaches the nearest to it, seems to make against the proposition contended for by the plaintiff. In that case the defendant had for many years penned back a stream for the purpose of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land: but as this percolation had been insensible, and unknown by the plaintiff until the land was applied for building purposes, the court held, that the defendant had gained no right thereby, so as to justify its continuance. The case of *Partridge v. Scott*, 3 M. & W. 230, is an authority to shew, that a man, by building a house on the extremity of his own land, does not thereby acquire any right of easement, for support or otherwise, over the adjoining land of his neighbour. It is said in that case, "he has no right to load his own soil, so as to make it require the support of that of his neighbour, unless he has some grant to that effect." It must follow, by parity of reason, that, if he digs a well in his own land so close to the soil of his neighbour as to require the support of a rib of clay or of stone in his neighbour's land to retain the water in the well, no action would lie against the owner of the adjacent land for digging away such clay or stone, which is his own property, and thereby letting out the water; and it would seem to make no difference as to the legal rights of the parties, if the well stands some distance within the plaintiff's boundary, and the digging by the defendant, which occasions the water to flow from the well, is some distance within the defendant's boundary; which is, in substance, the very case before us.

The Roman law forms no rule, binding in itself, upon the sub-

jects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.

The authority of one at least of the learned Roman lawyers appears decisive upon the point in favour of the defendants; of some others the opinion is expressed with more obscurity. In the Digest, lib. 39, tit. 3, *De æquâ et aquæ pluvie arcandæ*, s. 12, "Denique Marcellus scribit, Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi: nec de dolo actionem, et sane non debet habere; si non animo vicini nocendi, sed suum agrum meliorem faciendi, id fecit."

It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action.

We think, therefore, the direction given by the learned judge at the trial was correct, and that the judgment already given for the defendants in the court below must be affirmed.

*Judgment affirmed.*

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### MEEKER v. EAST ORANGE.

77 N.J. L. 623. 1909.

PITNEY, Chancellor. Plaintiff brought two actions in one of the District Courts of the city of Newark to recover damages for the diversion by the defendant of percolating underground water. In each case the District Court rendered judgment in favor of the defendant, and upon appeal to the Supreme Court the judgments were affirmed. By writs of error the records are brought here for review.

The cases were submitted to the trial court upon agreed state-

ments of fact. In one case it is stipulated that plaintiff owns and occupies a farm of about one hundred acres, situate in the valley of Canoe Brook, in the townships of Millburn and Livingston, in the county of Essex. He is a milkman, and has for a number of years used his farm for the pasture and support of his cows and horses. Canoe Brook and two small streams tributary thereto flow through his farm. Upon the farm there is also a spring, enclosed by a spring-house, the water of which has for years been used by the plaintiff for drinking purposes and for the storing and keeping of his milk. His cattle in pasture have for years resorted to the brook and its tributaries for drinking water. The defendant, the city of East Orange, under the authority of "An act to enable cities to supply the inhabitants thereof with pure and wholesome water," approved April 21st, 1876, and the acts supplemental thereto and amendatory thereof (Pamph. L., 366; Gen. Stat., 646), acquired a tract of land containing about six hundred and eighty acres, situate in the valley of Canoe Brook and in the township of Millburn, and installed thereon a water plant consisting of about twenty artesian wells, situate further down the stream than plaintiff's farm and distant upwards of a mile therefrom. In the construction of these wells, and of the works, mains and reservoirs connected therewith, the city has expended more than \$1,000,000. A few years prior to the commencement of the action the city began to take water from the wells, and has thus taken percolating underground water which, but for its interception, would have reached the plaintiff's spring or stream. No water other than percolating water has been taken, and no water has been taken out of any surface stream or from the spring of the plaintiff after it (the water) has appeared upon the surface or in any surface spring or stream. In this action the plaintiff seeks damages for the diversion of the underground water that otherwise would have reached his spring and streams.

In the other action the agreed statement of facts differs only in that it shows the existence upon plaintiff's farm of a well which for years had provided water for the various purposes of the plaintiff, and that as a result of the defendant's operations it had taken percolating underground water which otherwise would have reached this well, and had also taken percolating underground water from beneath the surface or soil of the plaintiff's land to such an extent that his crops will not now grow as they did formerly, and the taking of such percolating water has damaged the plaintiff's hay and crops and also has reduced the level of the water in his well. For this diversion damages are sought.

The judgments under review are based upon the theory that the city has an absolute right to appropriate all percolating water found beneath the land owned by it, and to use the water for purposes entirely unconnected with the beneficial use and enjoyment of that

land, to the extent, indeed, of making merchandise of the water and conveying it to a distance for the supply of the inhabitants of East Orange, and that although by such diversion the plaintiff's spring, well and stream are dried up, and his land rendered so arid as to be untillable, it is *damnum absque injuria*.

The judgments are attacked upon the ground that the law recognizes correlative rights in percolating subterranean waters; that each landowner is entitled to use such waters only in a reasonable manner and to a reasonable extent beneficial to his own land, and without undue interference with the rights of other landowners to the like use and enjoyment of waters percolating beneath their lands, or of water courses fed therefrom.

The law respecting the rights of property owners in percolating subterranean waters is of comparatively recent development, the first English decision bearing directly upon the question having been rendered in 1843. *Acton v. Blundell*, 12 Mees. & W. 324; 13 L. J. Exch. 289. This was followed by *Chasemore v. Richards* (1859), 7 H. L. Cas. 349; 29 L. J. Exch. 81; 5 Jur. (N.S.) 873; 1 Eng. Rul. Cas. 729. These cases may be taken as establishing for that jurisdiction the rule upon which the judgments under review are based.

They were followed by a considerable line of decisions in this country in which the English rule was adhered to, and which will be found discussed in Washb. Easem., \*363, \*390; Ang. Waterc., §§ 109-114, and 30 Am. & Eng. Encycl. L. (2d ed.) 310, 313.

The soundness of the English doctrine was, however, challenged by the Supreme Court of New Hampshire in a well-considered case decided in 1862 (*Bassett v. Salisbury Manufacturing Co.*, 43 N.H. 569; 3 Am. L. Reg. (N.S.) 223 (O.S., vol. 12); 82 Am. Dec. 179), where it was elaborately reasoned that the doctrine of absolute ownership is not well founded in legal principles, and is not so commended by its practical application as to require its adoption; that the true rule is that the rights of each owner being similar, and their enjoyment dependent upon the action of other landowners, their rights must be correlative and subject to the operation of the maxim *sic utere*, etc., so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of the similar rights of others. This decision was followed by *Swett v. Cutts* (1870), 50 N.H. 439; 9 Am. Rep. 276; 11 Am. L. Reg. (N.S.) 11, where the court again laid it down that the landowner has not an absolute and unqualified property in all such water as may be found in his soil, to do what he pleases with it, as with the sand and rock that form part of the soil, but that his right is to make reasonable use of it for domestic, agricultural and manufacturing purposes, not trenching upon the similar rights of others.

The doctrine thus enunciated has come to be known in the discussion of the topic as the rule of "reasonable use."

The question as to which of these contrary rules obtains in this State has not been set at rest by any previous adjudication in this court.

[The learned chancellor reviewed the authorities.]

A review of the reasoning upon which the English doctrine respecting percolating underground waters rests will demonstrate, as we think, that this reasoning is unsatisfactory in itself and inconsistent with legal principles otherwise well established.

Thus, in *Acton v. Blundell*, 12 Mees. & W. 349, Chief Justice TINDAL, in undertaking to show the inapplicability to percolating waters of the law that governs running streams, declared that the ground and origin of the law respecting the latter would seem to be that the right enjoyed by the several proprietors of the lands over which they flow is and always has been public and notorious; that the enjoyment has been long continued and uninterrupted, and therefore based upon the implied assent and agreement of the proprietors of the different lands from all ages, while underground waters, being concealed from view, there can be no implied mutual consent or agreement between the owners of the several lands respecting them. But, as has been since repeatedly pointed out, the right of the riparian owner to the flow of a natural stream arises *ex jure naturæ*, and not at all from prescription or presumed grant or acquiescence arising from long-continued user. See remarks of Baron PARKE, in *Broadbent v. Ramsbotham*, as reported in 25 L. J. Exch. (at p. 121), and remarks of Lord WENSLEYDALE in *Chasemore v. Richards*, 7 H. L. Cas. (at pp. 382, 383); 29 L. J. Exch. 87; 1 Eng. Rul. Cas. 752, 753, and cases cited.

Again, in *Acton v. Blundell*, 12 Mees. & W. 351, the Chief Justice said: "If a man who sinks a well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbor from making any use of the spring in his own soil which shall interfere with the enjoyment of the soil." Obviously, he failed to note that there is a middle ground between the existence of an absolute and indefeasible right and the absence of any right that the law will recognize and protect. There is room for the existence of qualified and correlative rights in both landowners.

The English rule seems to be rested at bottom upon the maxim, "*Cujus est solum, ejus est usque ad coelum et ad inferos.*" Thus, in *Acton v. Blundell*, 12 Mees. & W. 354, Chief Justice TINDAL said that the case fell within "that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure." Here the impracticability of

applying the rule of absolute ownership to the fluid, water, which by reason of its nature is incapable of being subjected to such ownership, is apparently overlooked. If the owner of Whiteacre is the absolute proprietor of all the percolating water found beneath the soil, the owner of the neighboring Blackacre must, by the same rule, have the like proprietorship in his own percolating water. How, then, can it be consistent with the declared principle to allow the owner of Whiteacre to withdraw, by pumping or otherwise, not only all the percolating water that is normally subjacent to his own soil, but also, and at the same time, the whole or a part of that which is normally subjacent to Blackacre? Where percolating water exists in a state of nature generally throughout a tract of land, whose parcels are held in several ownership by different proprietors, it is, in the nature of things, impossible to accord to each of these proprietors the absolute right to withdraw *ad libitum* all percolating water which may be reached by a well or pump upon any one of the several lots, for such withdrawal by one owner necessarily interferes to some extent with the enjoyment of the like privilege and opportunity by the other owners.

Again, the denial of the applicability to underground waters of the general principles of law that obtain with respect to waters upon the surface of the earth is in part placed upon the mere difficulty of proving the facts respecting water that is concealed from view. But experience has demonstrated in a multitude of cases that this difficulty is often readily solved. When it is solved in a given case, by the production of satisfactory proof, this reason for the rule at once vanishes.

It is sometimes said that unless the English rule be adopted, land owners will be hampered in the development of their property because of the uncertainty that would thus be thrown about their rights. It seems to us that this reasoning is wholly faulty. If the English rule is to obtain, a man may discover upon his own land springs of great value for medicinal purposes or for use in special forms of manufacture, and may invest large sums of money upon their development; yet he is subject at any time to have the normal supply of such springs wholly cut off by a neighboring landowner, who may, with impunity, sink deeper wells and employ more powerful machinery, and thus wholly drain the sub-surface water from the land of the first discoverer.

In the case before us the city of East Orange might have its underground water-supply cut off or materially impaired by the establishment of deeper wells and more powerful pumps upon some neighboring tract — even upon the tract owned by the plaintiff.

In short, under that rule, *might* literally makes *right*, and we are remitted to —



"The simple plan,  
That they should take who have the power,  
And they should keep who can."

For a further elaboration of the grounds upon which the "English rule" is open to criticism, and upon which the doctrine of "reasonable user" of subterranean percolating waters is supported, reference may be made to the dissenting opinion of Mr. Justice COLERIDGE, in *Chasemore v. Richards*, 2 H. & N. 188, 195, to the judgment of Lord WENSLEYDALE in the House of Lords in the same case, 7 H. L. Cas. 384, 389; 29 L. J. Exch. 87, 88; 1 Eng. Rul. Cas. 754, 757, and to the opinions in the recent American cases above cited.

Upon the whole we are convinced, not only that the authority of the English cases is greatly weakened by the trend of modern decisions in this country, but that the reasoning upon which the doctrine of "reasonable user" rests is better supported upon general principles of law and more in consonance with natural justice and equity.

We therefore adopt the latter doctrine. This does not prevent the proper user by any landowner of the percolating waters subjacent to his soil in agriculture, manufacturing, irrigation or otherwise, nor does it prevent any reasonable development of his land by mining or the like, although the underground water of neighboring proprietors may thus be interfered with or diverted. But it does prevent the withdrawal of underground waters for distribution or sale for uses not connected with any beneficial ownership or enjoyment of the land whence they are taken, if it results therefrom that the owner of adjacent or neighboring land is interfered with in his right to the reasonable user of sub-surface water upon his land, or if his wells, springs or streams are thereby materially diminished in flow, or his land is rendered so arid as to be less valuable for agriculture, pasturage or other legitimate uses.

It follows that the judgments of the District Court and of the Supreme Court must be reversed.

## CHAPTER IV.

## FIXTURES.

## SECTION 1.

## INCORPORATION OF CHATTELS INTO REALTY.

## LIPSKY v. BORGMANN.

52 Wis. 256. 1881.

THE defendant levied execution on the structure in question under a judgment against the plaintiff. The question was whether such structure was real or personal property.

ORTON, J. The circuit court having ruled and instructed the jury that the building was a part of the realty, and this being a mixed question of law and fact, it becomes necessary to review briefly the evidence bearing upon it.

There is a dwelling-house on the land, occupied by the plaintiff and his family as a residence, and used also as a saloon. The building in question is erected on one side of this main building, and next to the saloon, and built there by the plaintiff for the purpose of being used in connection with the saloon as a dancing hall. It is thirty-two feet square, the sills are fastened together at the ends with nails or spikes, the studding is fastened to the sills in the same way, and four or five feet apart, and on the top of the studding are fastened the plates in the same way; and the sills and plates are thirty-two feet in length, and two by eight or two by ten inches square. The sills rest at some places on the ground, and at other places on cedar posts set into the ground, and on cedar railroad ties and stones. A floor is laid over the whole space, in the center of which stands a post eight feet high, and six by eight inches square, from the top of which extend four rafters to the plates. The roof is intended to be square and four-cornered, and now consists of brush. There is a space between the buildings, and in it are constructed seats for the musicians, twelve feet long, upon cross-pieces fastened to both buildings, and a door is intended to open from the saloon into the dancing hall. It is in an unfinished condition, but used for the purpose intended; and it is intended to be made more complete and permanent, and to permanently remain, to be used in connection with the main

building for domestic purposes, and, in connection with the saloon business, as a dancing hall. The testimony on behalf of the defendant as to the frail character of this building, and the testimony offered by him and rejected, as to similar structures and how they were regarded, do not in the least militate against this statement of the evidence. As the circuit court virtually took the question from the jury, and decided that from this evidence this building was a fixture, the question here is, Would the jury have been justified in finding otherwise? or, in other words, Would the verdict be allowed to stand, on motion for a new trial, if they had so found? If not, the circuit court committed no error in taking the question from the jury and so deciding. From the character, situation and intended use of this building, as disclosed by this evidence, there can be no question that it was affixed to the soil and is a part of the realty. By the current of authorities it has all the requisites to make it such. It was constructed by the owner of the land. It has sufficient actual physical attachment to the main building and the soil, and was intended to be permanent, and to be always used, not only with the main building but for similar purposes, and not intended ever to be removed. To support this ruling, I need only to refer to some of the late decisions of this court, and in cases where the facts were not nearly as conclusive as in this case, and yet the constructions were held to be fixtures and not personalties. *Huebschmann v. McHenry*, 29 Wis. 655; *Kimball v. Darling*, 32 Wis. 675; *Jenkins v. McCurdy*, 48 Wis. 628; and *Taylor v. Collins*, 51 Wis. 123. We can find no error in the record.

BY THE COURT. — The judgment of the circuit court is affirmed.

NOTE. — A building "built on blocks set in the surface of the ground" was held to be realty in *State Savings Bank v. Kercheval*, 65 Mo. 682.

Certain finishing lumber, doors, and transoms had been placed in an unfinished building for the purpose of completing it; suitable openings for the doors and transoms had been left in the building, and all such material, including the finishing lumber, was necessary for the completion of the building. The court held that such material was realty. *Rahm v. Domayer*, 137 Iowa 18. See, *contra*, *Blue v. Gunn*, 114 Tenn. 414.

The fragments of a building, blown down by a tempest, were held not to be thereby converted into personalty in *Rogers v. Gilinger*, 30 Pa. 185.

"When a building is erected, *prima facie*, it is a part of the land upon which it stands, and, in order to rebut the presumption of law, a state of facts must be shown to take it out of the operation of the general rule." *Indianapolis Ry. Co. v. First National Bank*, 134 Ind. 127.

## LAWTON v. SALMON.

1 H. Bl. 259, n. 1789.

In this action of trover, brought by the executor against the tenant of the heir at law of the testator, to recover certain vessels used in salt-works, called *salt-pans*, a case was reserved by consent, which stated, —

That the testator, some years before his death, placed the salt-pans in the works: that they were made of hammered iron and riveted together; that they were brought in pieces and might be again removed in pieces; that they were not joined to the walls, but were fixed with mortar to a brick floor; that there were furnaces under them; that there was a space for the workmen to go round them; that there were no rooms over them; but that there were lodgings at the end of the wych-houses; that they might be removed without injuring the buildings, though the salt works would be of no value without them, which with them were let for 8*l.* per week.

LORD MANSFIELD. All the old cases, some of which are in the year books, and *Brooke's Abridgment*, agree, that whatever is connected with the freehold, as wainscot, furnaces, pictures fixed to the wainscot, even though put up by the tenant, belong to the heir. But there has been a relaxation of the strict rule in that species of cases, for the benefit of trade, between landlord and tenant; that many things may now be taken away which could not be formerly, such as erections for carrying on any trade, marble chimney-pieces and the like, when put up by the tenant. This is no injury to the landlord, for the tenant leaves the premises in the same state in which he found them, and the tenant is benefited. There has been also a relaxation in another species of cases between tenant for life and remainder-man, if the former has been at any expense for the benefit of the estate, as by erecting a fire-engine, or anything else by which it may be improved; in such a case it has been determined that the fire-engine should go to the executor, on a principle of public convenience being an encouragement to lay out money in improving the estate, which the tenant would not otherwise be disposed to do. The same argument may be applied to the case of tenant for life and remainder-man as that of landlord and tenant, namely, that the remainder-man is not injured, but takes the estate in the same condition as if the thing in question had never been raised.

But I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mills, which is not printed at large. The present case is very strong. The salt-spring is a valuable inheritance, but no profit arises from it, unless there is a salt-work; which consists of a building, etc., for the purpose of containing the pans, etc., which are fixed to the ground. The inher-

itance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing therefore and the intention of the testator, they must go to the heir. It would have been a different question if the springs had been let, and the tenant had been at the expense of erecting these salt-works; he might very well have said, "I leave the estate no worse than I found it." That, as I stated before, would be for the encouragement and convenience of trade, and the benefit of the estate. Mr. Wilbraham in his opinion takes the distinction between executor and tenant. For these reasons we are all of opinion that the salt-pans must go to the heir.

*Postea to the defendant.*

NOTE. — In *Noble v. Bosworth*, 19 Pick. (Mass.) 314, SHAW, C.J., said: "We have no doubt that where an owner erects a dye-house on his own land, and sets up dye-kettles therein, firmly secured in brick work, they become part of the realty, and pass by a deed of the land without express words."

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TOLLES v. WINTON.

63 Conn. 440. 1893.

FENN, J. This is an appeal by the defendants from a judgment rendered by the Court of Common Pleas in Fairfield County. The complaint contained the common counts, under which a bill of particulars was filed, as follows: "To \$500 cash paid to Andrew L. Winton by the plaintiff, upon an agreement for the purchase of certain real estate by the plaintiff from said Winton, which agreement the said Winton improperly failed and refused to consummate and carry out." The answer, a general denial, was accompanied by a counterclaim, which set up a contract for the conveyance of real estate, alleged a breach on the part of the plaintiff and claimed \$1,000 damages. The court found that the plaintiff did refuse to consummate the contract, for the reason that the defendants, between the date of the contract and the time fixed for the final payment and the delivery of the deed, removed from the premises a steam engine thereon located, and sold and delivered the same to third parties, without the knowledge or consent and against the will of the plaintiff. And thereupon the parties were at issue, as to whether the

removal of said engine from the premises legally justified the plaintiff in refusing to consummate the contract, the plaintiff claiming that the engine was a part of the realty, which claim the court below sustained, and the defendants claiming that it was personal property.

The facts found by the court in reference to the engine were these: "The land and buildings referred to in the contract consisted of a substantial three story and basement brick edifice, with the ground under and about the same, situated on Middle Street in the city of Bridgeport. Said Winton had long owned the premises, and about five years before the contract was made and while owning the same, had occupied the first floor thereof as a feed store, and in order to make the upper stories available for tenants needing power, he placed in the basement thereof an engine and boiler, and connected the same by appropriate shafting and belting with the upper stories, and thereby supplied motive power to his tenants renting the same. Said building had not been constructed originally for the use of machinery, and the interior of the building was prepared by Winton, in the manner herein set forth, for the reception of the engine and boiler, together with the belting and shafting necessary to convey the power from the cellar to the upper stories. No machinery was prepared for the use of power on the first floor, occupied by said Winton. The engine stood three or four feet from the boiler, and about two years before the execution of the contract was disconnected from the boiler by unscrewing couplings, because the tenant who then occupied the upper part of the building desired to run a small engine, placed in the upper stories, which was run however by steam supplied by the boiler in the basement. The engine continued so disconnected at the date of the contract. The engine was set up and attached to the property in the following manner:— a cavity was dug in the basement floor, in which a solid foundation of stone and cement was laid, and in this grouting were imbedded bolts, which extended upwards, passing through a timber placed on the grouting in such a manner and location as to receive the engine. The engine was then placed on the timber, and the bolts passing through plates on the engine were capped by nuts screwed upon them, thus fastening the engine firmly to the timber and grouting. By unscrewing the nuts the engine could be lifted from the bolts, and removed without other injury to the building than the loss of the engine, but the bolts could not be removed without tearing up and destroying the grouting. The boiler was similarly fixed upon a foundation of grouting, and a pit was dug in the basement floor, in connection with the boiler for ashes."

In deciding the question thus presented it is unnecessary to do more than to refer, and that but briefly, to our own Connecticut cases. In *Capen v. Peckham*, 35 Conn. 92, 93, this court, by PARK, J., declared that while "no rule can be found of universal application that clearly defines the line where an article loses its legal quality as a

chattel, and assumes that of real estate," yet "the great weight of authority is in favor of the doctrine that to constitute a fixture it is necessary that the article should be annexed to the freehold, as the name itself imports; but there is great diversity of opinion in relation to the degree of annexation which is essential for this purpose." It is further said that many cases hold that such annexation "must be permanently made, so much so that the article cannot be removed without injury to the freehold." This, however, though declared essential in a great majority of cases, is not held to be so in all. "Millstones and water wheels used in milling establishments are universally conceded to be a part of the realty; still many of them could be removed without the least injury to the freehold." Farm fences are also mentioned. It is then said that another class of cases hold the true test of a fixture to be "the adaptation of the article to the uses and purposes to which the realty is applied, and no regard is had to the character of the annexation." This rule is declared to be too extensive in its application; and the court then proceeds to suggest, as the nearest possible approximation to a rule of universal application, one which requires annexation to the freehold, but considers the degree and permanency in character of such annexation, as well as the nature and adaptation of the article annexed to the uses and purposes to which that part of the building was appropriated at the time the annexation was made, as important solely by reason of the bearing it may have upon the decision of the ultimate question (to be determined from an inspection of the property itself, and its view, in the light of surrounding circumstances) whether a permanent accession to the freehold was intended to be made by the annexation of the article; thus making such intention so determined the paramount consideration. This case was followed by that of *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86, the same judge writing the opinion and re-stating and applying the same rule of intention; and the court, by the application of such rule, decided that a factory bell placed in a tower built upon the factory for the purpose, and a blower pipe conveying air from a blower to a forge were part of the realty. Again, in *Stockwell v. Campbell*, 39 Conn. 362, the same judge again writing the opinion, this court, repeating and counting upon the same rule, and saying distinctly that "physical annexation" need not be such "as to require any actual disruption for its removal," instancing the case of doors and window blinds, held a portable hot air furnace, placed in the cellar of a dwelling house for the purpose of warming the house, and set in a pit prepared for it in the bottom of the cellar where it was held in place simply by its own weight, and also the smoke pipe leading from the furnace to the chimney of the house, to be parts of the realty. And there are other cases in this state in accord with these decisions. But no further citation of authority seems requisite.

Applying the rule thus established to the case before us, it seems manifest that, looking at the property itself, taking into consideration the character of its annexation as recited, its nature, its adaptation to the uses and purposes to which the building was appropriated at the time the annexation was made, and the relation of the party making it to the property to which it was annexed (such party being the owner), a permanent accession to the freehold was intended to be made by the annexation of the article, and that by such annexation it became and was a part of the realty.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

NOTE. — See, *accord*, *Harkness v. Sears*, 26 Ala. 493; *Sands v. Pfeiffer*, 10 Cal. 258; *Brigham v. Overstreet*, 128 Ga. 447; *Lapham v. Norton*, 71 Me. 83; *Winslow v. Merchants Insurance Co.*, 4 Met. (Mass.) 306; *Thomas v. Davis*, 76 Mo. 72; *Despatch Line v. Bellamy Company*, 12 N.H. 205; *Horne v. Smith*, 105 N.C. 322.

But *cf.* *People v. O'Donnell*, 202 N.Y. 313; *Vail v. Weaver*, 132 Pa. 363; *Padgett v. Cleveland*, 33 S.C. 339.

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### HOLLAND v. HODGSON.

L. R. 7 C. P. 328. 1872.

BLACKBURN, J. In this case George Mason, who was owner in fee of a mill occupied by him as a worsted mill, mortgaged the mill and all fixtures which then were, or at any time thereafter should be set up and affixed to the premises, in fee to the plaintiffs. The mortgage deed was not registered as a bill of sale, and Mason, who continued in possession, assigned all his estate and effects to the defendants as trustees for the benefit of his creditors. The defendants under this last deed took possession of everything. The plaintiffs brought trover.

There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel; see *Wiltshire v. Cottrell*, 1 E. & B. 674; 22 L. J. (Q.B.) 177, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v.*



*Gregory*, Law Rep. 3 Eq. 382. Thus blocks of stone placed one on the top of another, without any mortar or cement, for the purpose of forming a dry stone wall, would become part of the land; though the same stones, if deposited in a builder's yard and for convenience' sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land; and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge, would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel. This last proposition seems to be in effect the basis of the judgment of the Court of Common Pleas delivered by MAULE, J., in *Wilde v. Waters*, 16 C. B. 637; 24 L. J. (C.P.) 193. This, however, only removes the difficulty one step, for it still remains a question in each case whether the circumstances are sufficient to satisfy the onus. In some cases, such as the anchor of the ship, or the ordinary instance given of a carpet nailed to the floor of a room, the nature of the thing sufficiently shews it is only fastened as a chattel temporarily, and not affixed permanently as part of the land. But ordinary trade or tenant fixtures which are put up with the intention that they should be removed by the tenant (and so are put up for a purpose in one sense only temporary, and certainly not for the purpose of improving the reversionary interest of the landlord) have always been considered as part of the land, though severable by the tenant. In most, if not all, of such cases the reason why the articles are considered fixtures is probably that indicated by Wood, V.C., in *Boyd v. Shorrocks*, Law Rep. 5 Eq. at p. 78, that the tenant indicates by the mode in which he puts them up that he regards them as attached to the property during his interest in the property. What we have now to decide is as to the application of these rules to looms put up by the owner of the fee in the manner described in the case. In *Hellawell v. Eastwood*, 6 Ex. 295; 20 L.J. (Ex.) 154 (decided in 1851), the facts as stated in the report are, that

the plaintiff held the premises in question as tenant of the defendants, and that a distress for rent had been put in by the defendants under which a seizure was made of cotton-spinning machinery called "mules," some of which were fixed by screws to the wooden floor, and some by screws which had been sunk in the stone floor, and secured by molten lead poured into them. It may be inferred that the plaintiff being the tenant only had put up those mules; and from the large sum for which the distress appears to have been levied (2000*l.*) it seems probable that he was the tenant of the whole mill. It does not appear what admissions, if any, were made at the trial, nor whether the court had or had not by the reservation power to draw inferences of fact, though it seems assumed in the judgment that they had such a power. PARKE, B., in delivering the judgment of the court, says, "This is a question of fact depending on the circumstances of each case, and principally on two considerations; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *intégrè salve et commode* or not without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, *perpetui usûs causâ*, or in that of the year book, *pour un profit del inheritance*, or merely for a temporary purpose and the more complete enjoyment and use of it as a chattel." It was contended by Mr. Field that the decision in *Hellawell v. Eastwood* had been approved in the Queen's Bench in the case of *Turner v. Cameron*, Law Rep. 5 Q. B. 306. It is quite true that the court in that case said that it afforded a true exposition of the law as applicable to the particular facts upon which the judgment proceeded; but the court expressly guarded their approval by citing from the judgment delivered by PARKE, B., the facts upon which they considered it to have proceeded: "They were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." As we have already observed, trade or tenant fixtures might in one sense be said to be fixed "merely for a temporary purpose"; but we cannot suppose that the Court of Exchequer meant to decide that they were not part of the land, though liable to be severed by the tenant.

The words "merely for a temporary purpose" must be understood as applying to such a case as we have supposed, of the anchor dropped for the temporary purpose of mooring the ship, or the instance immediately afterwards given by PARKE, B., of the carpet tacked to the floor for the purpose of keeping it stretched whilst it was there used, and not to a case such as that of a tenant who, for

example, affixes a shop counter for the purpose (in one sense temporary) of more effectually enjoying the shop whilst he continues to sell his wares there. Subject to this observation, we think that the passage in the judgment in *Hellawell v. Eastwood* does state the true principles, though it may be questioned if they were in that case correctly applied to the facts. The court in their judgment determine what they have just declared to be a question of fact thus: "The object and purpose of the connection was not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels." Mr. Field was justified in saying, as he did in his argument, that as far as the facts are stated in the report they are very like those in the present case, except that the tenant who put the mules up cannot have been supposed to intend to improve the inheritance (if by that is meant his landlord's reversion), but only at most to improve the property whilst he continued tenant thereof; and he argued with great force that we ought not to act on a surmise that there were any special facts or findings not stated in the report, but to meet the case, as shewing that the judges who decided *Hellawell v. Eastwood* thought that articles fixed in a manner very like those in the case before us remained chattels; and this is felt by some of us at least to be a weighty argument. But that case was decided in 1851. In 1853 the Court of Queen's Bench had, in *Will-shear v. Cotterill*, to consider what articles passed by the conveyance in fee of a farm. Among the articles in dispute was a threshing machine, which is described in the report thus: "The threshing machine was placed inside one of the barns (the machinery for the horse being on the outside), and there fixed by screws and bolts to four posts which were let into the earth." *Hellawell v. Eastwood* was cited in the argument. The court (without, however, noticing that case) decided that the threshing machine, being so annexed to the land, passed by the conveyance. It seems difficult to point out how the threshing machine was more for the improvement of the inheritance of the farm than the present looms were for the improvement of the manufactory; and in *Mather v. Fraser*, 2 K. & J. 536; 25 L.J. (Ch.) 361, Wood, V.C., who was there judge both of the fact and the law, came to the conclusion that machinery affixed not more firmly than the articles in question by the owner of the fee to land, for the purpose of carrying on a trade there, became part of the land. This was decided in 1856. And in *Walmsley v. Milne*, 7 C.B. (N.S.) 115; 29 L.J. (C.P.) 97, the Court of Common Pleas, after having their attention called to a slight misapprehension by Wood, V.C., of the effect of *Hellawell v. Eastwood*, came to the conclusion, as is stated by them, at p. 131, "that we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the premises, subject only to a mort-

gage which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding-stones were also permanent erections, intended by the owner to add to the value of the premises. They therefore resemble in no particular (except being fixed to the building by screws) the mules put up by the tenant in *Hellawell v. Eastwood*." It is stated in a note to the report of the case that, on a subsequent day, it was intimated by the court that Mr. Justice WILLES entertained serious doubts as to whether the articles in question were not chattels. The reason of his doubt is not stated, but probably it was from a doubt whether the Exchequer had not, in *Hellawell v. Eastwood*, shewn that they would have thought that the articles were not put up for the purpose of improving the inheritance, and from deference to that authority. The doubt of this learned judge in one view weakens the authority of *Walmsley v. Milne*, but in another view it strengthens it, as it shews that the opinion of the majority, that as a matter of fact the hay-cutter, which was not more firmly fixed than the mules in *Hellawell v. Eastwood*, must be taken to form part of the land, because it was "put up as an adjunct to the stable, and to improve its usefulness as a stable," was deliberately adopted as the basis of the judgment; and it is to be observed that WILLES, J., though doubting, did not dissent. *Walmsley v. Milne* was decided in 1859. This case and that of *Wiltshire v. Cotterill* seem authorities for this principle, that where an article is affixed by the owner of the fee, though only affixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied. The threshing machine in *Wiltshire v. Cotterill* was affixed by the owner of the fee to the barn as an adjunct to the barn, and to improve its usefulness as a barn, in much the same sense as the hay-cutter in *Walmsley v. Milne* was affixed to the stable as an adjunct to it, and to improve its usefulness as a stable. And it seems difficult to say that the machinery in *Mather v. Fraser* was not as much affixed to the mill as an adjunct to it and to improve the usefulness of the mill as such, as either the threshing machine or the hay-cutter. If, therefore, the matter were to be decided on principle, without reference to what has since been done on the faith of the decisions, we should be much inclined, notwithstanding the profound respect we feel for everything that was decided by PARKE, B., to hold that the looms now in question were, as a matter of fact, part of the land. But there

is another view of the matter which weighs strongly with us. *Hellawell v. Eastwood* was a decision between landlord and tenant, not so likely to influence those who advance money on mortgage as *Mather v. Fraser*, which was a decision directly between mortgagor and mortgagee. We find that *Mather v. Fraser*, which was decided in 1856, has been acted upon in *Boyd v. Shorrocks*, Law Rep. 5 Eq. 72, by the Court of Queen's Bench in *Longbottom v. Berry*, Law Rep. 5 Q.B. 123, and in Ireland in *Re Dawson*, Ir. Law Rep. 2 Eq. 222. These cases are too recent to have been themselves much acted upon, but they shew that *Mather v. Fraser* has been generally adopted as the ruling case. We cannot, therefore, doubt that much money has, during the last sixteen years, been advanced on the faith of the decision in *Mather v. Fraser*. It is of great importance that the law as to what is the security of a mortgagee should be settled; and without going so far as to say that a decision only sixteen years old should be upheld, right or wrong, on the principle that *communis error facit jus*, we feel that it should not be reversed unless we clearly see that it is wrong. As already said, we are rather inclined to think that, if it were *res integra* we should find the same way. We think, therefore, that the judgment below should be affirmed.

*Judgment [for the plaintiffs] affirmed.*

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### HUBBELL v. EAST CAMBRIDGE BANK.

132 Mass. 447. 1882.

REPLEVIN of "one large engine lathe, one small engine lathe, one Ames iron planer and one upright drill." The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, upon agreed facts in substance as follows:—

The articles replevied, at the time the mortgage hereinafter named was made, and at the time this action was brought, were in a building in Somerville, owned and used by the American Art Foundry Company in the business of manufacturing metallic castings and metallic goods, and were suitable for and used in said manufacture.

On October 25, 1875, said company mortgaged to the defendant the land on which the building was situated. This mortgage contained the usual power of sale, and was duly recorded. On September 6, 1878, there being a default in the condition of the mortgage, the defendant made an entry for the purpose of foreclosing the same; and on January 13, 1879, duly sold the premises under the power in the mortgage to John H. Leighton, who, on January 29, reconveyed the premises to the defendant.

On July 27, 1877, the American Art Foundry Company sold to the

plaintiff all the machinery, tools, fixtures and personal property used in the business of the company in said building.

The large engine lathe named in the writ was seven feet long, three feet high and fifteen inches wide, and weighed about 1400 pounds. The small engine lathe was forty-two inches long, three and one half feet high and fifteen inches wide, and weighed 500 pounds. The Ames iron planer was four feet long, three feet high and twenty inches wide, and weighed 1600 pounds. The upright drill weighed about 1200 pounds. Each of these machines was supported on four iron legs, which rested upon a plank floor of about two inches in thickness. In the foot of each leg was a hole, through which passed a screw of from one and one half to two inches in length and a little less than a quarter of an inch in diameter, by which the machines were fastened to the floor for the purpose of steadying them while in use. Each of these machines was operated by a belt and pulley connected with a counter-shaft, which was connected by a belt and pulley with a line of main shafting running through the building. All of these machines could be removed without displacing or materially injuring any part of the building or land, and used elsewhere for similar purposes.

MORTON, C.J. The only question in this case is whether the articles replevied passed to the defendant as a part of the realty under its deed of mortgage from the American Art Foundry Company.

It is impossible to lay down any precise test by which to determine whether machinery or other articles attached to or used in a building become a part of the realty. It depends upon the relations of the parties, the character of the articles, their adaptation to, and the manner in which they are attached to, or used in, the building, and generally upon the circumstances of each case as indicating the intention of the parties. In the case of machinery or other articles, which are not obviously an integral part of the realty, the question is whether all the facts of the case lead to the presumption or inference that the owner, in placing them in the building, intended them as a permanent improvement of or addition to the realty. If this is the fair presumption or inference, then a grantee or mortgagee would have the right to consider them as constituting a part of the realty, and they would pass to him by his deed. *Winslow v. Merchants' Ins. Co.*, 4 Met. 306; *Pierce v. George*, 108 Mass. 78; *McConnell v. Blood*, 123 Mass. 47; *Allen v. Mooney*, 130 Mass. 155.

In the case before us, the mortgage deed to the defendant merely conveys the land upon which the building stood, and contains no reference to any of the machinery used in the building. It therefore furnishes no indication that the parties intended or understood that any of the machines were to be regarded as a part of the realty.

The machines in question were not annexed to the building, so as to indicate that they were intended to be a part of the realty. Each

of them had four iron legs, which stood upon the floor, and were fastened to the floor by screws only for the purpose of steadying them when in use. They were movable machines, which, though heavy, could be moved without injury to the building, and were equally adapted for use elsewhere. The mere fact that they were adapted to be used in this factory, and that they were necessary to carry on the business, is not enough of itself to impress on them the character of realty. The same thing is true of the tools used by hand in the manufacture there carried on.

The case cannot be distinguished from *McConnell v. Blood*, *ubi supra*, and we are of opinion that, upon the facts agreed, the judgment of the Superior Court in favor of the plaintiff was right.

*Judgment affirmed.*

NOTE. — In a majority of the cases decided by the courts in the United States, dealing with facts similar to those in the principal case, the courts have held the machinery to be personalty. See *Swift v. Thompson*, 9 Conn. 63; *Wade v. Johnston*, 25 Ga. 331; *Crane Iron Works v. Wilkes*, 64 N.J.L. 193; *Murdock v. Gifford*, 18 N.Y. 28; *Teaff v. Hewitt*, 1 Ohio St. 511; *Honeyman v. Thomas*, 25 Or. 539; *Zimmermann v. Bosse*, 60 Wash. 556.

But cf. *Fifield v. Farmers' National Bank*, 148 Ill. 163; *Ottumwa Mill Co. v. Hawley*, 44 Iowa 57; *Parsons v. Copeland*, 38 Me. 537; *Langdon v. Buchanan*, 62 N.H. 657; *McRea v. Central Bank*, 66 N.Y. 489.

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### *Ex parte* ASTBURY.

L. R. 4 Ch. App. 630. 1869.

SIR G. M. GIFFARD, L.J. The questions in cases of this description are, for the most part, much more questions of fact than of law, for to my mind the law has been settled, but the facts necessarily differ more or less in each particular case.

With respect to the law, it is admitted that where there is a mortgage of a manufactory, and part of the machinery used in it is a fixture, that part passes. We have, therefore, to determine what, according to the law, are, in a proper sense, fixtures. There are two *dicta* which will be sufficient to guide us for the present purpose. In *Mather v. Fraser*, 2 K. & J. 536, it was decided that the article must be an essential part of the machine. I think that was all that it was necessary to lay down in that case. The *dictum* of Lord COTTENHAM in *Fisher v. Dixon*, 12 Cl. & F. 312, was that all "belonging to the machine" would pass, and I should say in this case the proper test to lay down would be that the chattel must be "something which belongs to the machine as part of it."

Now, these machines were rolling machines, and there appear to be connected with rolling machines parts which, beyond all doubt, are not fixed, in the strict sense of the term; but it is in evidence that if a machine is ordered, it is sent with one set of rolls, and it is quite manifest that without rolls the machine could not do any part of the work for which it is made. One set of rolls clearly passes. But we have here duplicate rolls, and with reference to them — I am not now speaking of rolls which can be considered as, in any sense, unfinished, but of duplicate rolls which have been actually fitted to the machine — I cannot see why, if one set of rolls passes, the duplicate rolls should not pass also. It comes, in fact, to this, that the machine with one set of rolls is a perfect machine, but the machine with a duplicate set is a more perfect machine. I think, therefore, that each set of rolls necessarily belongs to the machine as part of it. I do not think that this is at all affected by the *dictum* of FITZHERBERT; but if it was, my answer would be, that this subject has been considered much more of late years than it was in olden times, and that the matter decided was with regard to a question of distress. If it were desired to reduce the question to an absurdity, it would be by supposing a case of duplicate latch keys to a door, and holding that one only should pass, and not the other. The fact is, that whether there is one set of rolls or a duplicate set, they are each part and parcel of the machine, and come within the term “belonging to the machine as part of it.”

Then comes the case as to the different sizes of rolls. But if the duplicates of the same size pass, it follows that the rolls of different sizes pass, if they render the machine still more perfect than if the rolls were all of the same size.

Then we come to another and different class of rolls, and there I confess I differ from the Registrar who has given his opinion in this case. I allude to those rolls which had been made for the purpose of being used in this machine, and had been sent to the mill for that purpose, but had never been fitted to the machine, and which required something more to be done to fit them to the machine in order that they might be used in it. I think that if a man mortgages a machine, and afterwards, the machine itself being perfect, and fitted with rolls and everything else connected with it, other rolls are sent for to be used with the machine, but those rolls cannot be used unless and until they are fitted to the machine, it would be going a long way to say that the mortgagor should be compelled to fit those rolls to the machine, and should be precluded from saying that they do not form a part of the machine.

Therefore I am of opinion that, as regards the duplicate rolls, as regards the rolls of different sizes, as regards all the rolls which have been actually fitted to the machine, they belong to the machine as part of the machine — they are, in fact, essential parts of the ma-



chine. But I cannot hold that the rolls which have never been fitted to the machine, and have never been used in the machine, and which require something more to be done to them before they are fitted to the machine, belong to the machine, or that they are essential parts of it. Therefore, in that respect, the order will be varied.

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### HOPEWELL MILLS v. TAUNTON SAVINGS BANK.

150 Mass. 519. 1890.

TORT for the conversion of certain cotton machinery. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal on agreed facts, in substance as follows:—

On December 16, 1884, the plaintiff corporation became the owner of an estate, consisting of land with a cotton mill and other buildings thereon and of an adjacent water privilege, by which together with steam power the mill was run. This estate was conveyed to the plaintiff, subject to a mortgage made in 1876 by the plaintiff's predecessor in title to the first-named defendant, which included the mill "with all machinery, tools, and fixtures and furniture therewith appertaining." The mill, when this mortgage was given and for some time thereafter, was used only in making white or uncolored cotton goods. Subsequently the machinery in question was purchased by the plaintiff and by one of its predecessors in title, and placed either in the mill or in additions erected thereto, and consisted of a ring frame, mules, looms and loom beams, a skein winder, reel, cop spooler, dresser, four dobby-heads, a picker head or beater, and a cloth brush and shear. All this machinery was put into the mill, either for the better manufacture of the kind of cotton goods hitherto made there, or for making new varieties of cotton goods, both colored and uncolored; and all of it, with the exception of the brush and shear, which replaced another brush then laid aside as ineffective, was additional to that already in the mill. The machines, with the exception of the dobby-heads and loom beams, were large and heavy, varying in weight from three hundred to two thousand pounds, and, with the exception of the picker head, were screwed down to the floors of the rooms in which they were situated, in order to steady them when in use; but this was not the only purpose for which they were so fastened. The machines were connected by pulleys, belts, and shafting with the power operating the mill. None of them was specially built for use in this particular mill, and all could equally well be used for the same purposes in any other cotton mill with the ordinary room to hold it and power to operate it. The new looms, reel, cop spooler, skein winder, dresser, and dobby-heads, which last were attached to four of the old

looms in the mill, were all put in for the making of new kinds of cotton cloth, but were equally well adapted for that hitherto manufactured in the mill. The reel and skein winder were necessary for winding the colored yarn for the new colored goods, and the cop spooler was put in to wind the yarn spun by the new mules. The dresser was heated by a system of steam pipes within it, connected with the main boiler of the mill. The loom beams, each of which formed an essential part of a loom, were purchased and placed in the mill to facilitate the weaving of the new kinds of goods, both plain and colored. They were used for holding warp, and were laid upon the looms, being in no way fastened to them, and were steadied by a rope with a weight attached. The picker head or beater was attached to the picker then in the mill, which up to that time had had but one beater, and served to render the machine more effective. The mill and additions could be as beneficially used in the manufacture of other textile fabrics, in the sense that any cotton mill could be so used. All of the machines could be taken out of the mill without injury to themselves, or to the realty, except to a very slight extent by leaving screw holes in the floor.

The plaintiff, after all the above machinery had been purchased and placed in the mill, operated it until October 1, 1887, and then ran out the stock and closed the mill, and ceased to pay interest on the mortgage. Thereafter the first-named defendant duly foreclosed the mortgage for breach of condition by a sale of the entire estate, and subsequently, on July 10, 1888, conveyed it to the other defendants, Cyrus G. Beebe and Frederick Beebe, the deed to them including the "machinery, tools, and furniture thereto appertaining and belonging." The Beebes entered into possession, the machinery in question being at the time still affixed to the mill as above stated, and not since detached, and at once began to operate the mill as a cotton mill, using all the machinery, and refused to give it up or to allow the plaintiff to take it, although due demand was made on them therefor.

If upon these facts the plaintiff could recover, judgment was to be entered in its favor; otherwise, judgment was to be for the defendants.

KNOWLTON, J. This case is submitted on an agreed statement of facts; and, since the burden of proof is on the plaintiff, there must be judgment for the defendants unless the facts stated establish the plaintiff's title.

There is some conflict of authority, in different jurisdictions, in regard to the question when machines placed in a building become fixtures which pass with a conveyance of the real estate. In this commonwealth the general principles applicable to such cases have often been considered, and are well established; but there is frequently difficulty in the application of them to particular cases.

The character of the property, as real or personal, may be fixed by contract with the owner of the real estate when the article is put in position; but such a contract cannot affect the rights of a mortgagee, or of an innocent purchaser without notice of it. *Hunt v. Bay State Iron Co.*, 97 Mass. 279. *Thompson v. Vinton*, 121 Mass. 139. *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542, 545. *Case Manuf. Co. v. Garven*, 45 Ohio St. 289. Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted, — an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place. *Turner v. Wentworth*, 119 Mass. 459. *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542, 545. *Allen v. Mooney*, 130 Mass. 155. *Smith Paper Co. v. Servin*, 130 Mass. 511, 513. *Hubbell v. East Cambridge Bank*, 132 Mass. 447. *Maguire v. Park*, 140 Mass. 21. *McRea v. Central National Bank*, 66 N.Y. 489. *Hill v. National Bank*, 97 U.S. 450. *Ottumwa Woolen Mill v. Hawley*, 44 Iowa, 57. These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose; and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position.

Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact. *Turner v. Wentworth*, 119 Mass. 459. *Allen v. Mooney*, 130 Mass. 155. *Maguire v. Park*, 140 Mass. 21. *Carpenter v. Walker*, 140 Mass. 416. *Southbridge Savings Bank v. Mason*, 147 Mass. 500. But the principal facts, when stated, are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can decide the question. The nature of the article, and the object, the effect, and the mode of its annexation, are all to be considered. In this commonwealth it has been said that "whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the purpose for which it was

erected, and permanently to increase its value for occupation or use, although it may be removed without injury to itself or the building, becomes part of the realty." *Southbridge Savings Bank v. Mason*, 147 Mass. 500. *Pierce v. George*, 108 Mass. 78. This rule generally prevails also in other jurisdictions. *Parsons v. Copeland*, 38 Maine, 537. *Holland v. Hodgson*, L. R. 7 C. P. 328. *Longbottom v. Berry*, L. R. 5 Q. B. 123. *McRea v. Central National Bank*, 66 N.Y. 489. *Hill v. National Bank*, 97 U.S. 450. *Harlan v. Harlan*, 15 Penn. St. 507. *Delaware, Lackawanna, & Western Railroad v. Oxford Iron Co.*, 9 Stew. 452. *Roddy v. Brick*, 15 Stew. 218, 225. *Ottumwa Woolen Mill v. Hawley*, 44 Iowa, 57.

We are of opinion that this rule is applicable to the case at bar. The building mortgaged was a cotton mill; and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy; and there is much to indicate that, while there were changes in the kinds of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position, and there used with the building until they should be worn out, or until, for some unforeseen cause, the real estate should be changed and put to a different use. Of most of them it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building, and connected with the motive power, with a view to permanence. The loom beams are essential parts of the looms; and although they are not fastened to the looms, but are laid upon them when in use, they are no less real estate than those parts of the looms which are annexed to the realty. No suggestion is made in regard to any other part of the property, which calls for a distinction between different articles.

We are of opinion that the agreed facts do not show that the machinery was personal property, for which trover can be maintained; and the entry must be,

*Judgment for the defendants.*

NOTE. — For cases holding that equipment intended to be, and remain, a part of an assembled plant is realty, see *Humes v. Higman*, 145 Ala. 215; *Kansas City Co. v. Anderson*, 88 Ark. 129; *Equitable Co. v. Knowles*, 8 Del. Ch. 106; *Brigham v. Overstreet*, 128 Ga. 447; *Fifield v. Farmers' Bank*, 148 Ill. 163; *Dudley v. Hurst*, 67 Md. 44, 51; *Dhring v. Beck*, 146 Mich. 706; *Feder v. Van Winkle*, 53 N.J. Eq. 370.

## HILLEBRAND v. NELSON.

95 N. W. (Neb.) 1068. 1901.

POUND, C. We are brought, therefore, to the question whether the articles in controversy were a part of the realty, or, in other words, fixtures, so as to pass by the mortgage of the realty. They are described in the petition as "the following goods and chattels, to wit, fifteen wheelbarrows, one tool box, one sand box, four planks, two thousand square boards eight by ten inches, one oil tank and contents, twenty-five planks, three crowbars, two shovels, 3550 pallets." The mere enumeration of these articles, which the plaintiff had the burden of proving to be a part of the realty, is almost decisive. The ordinary criteria of a fixture are: "(1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold, this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made." *Oliver v. Lansing*, 59 Neb. 219, 80 N. W. 829. These requisites are not alternative; they must concur. *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744, 53 Am. Rep. 1; *Farmers' Loan & Trust Co. v. Minneapolis Engines & Machine Works*, 35 Minn. 543, 29 N. W. 349; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Helm v. Gilroy*, 20 Or. 522, 26 Pac. 853; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 523, 23 N. E. 327, 6 L. R. A. 249, 15 Am. St. Rep. 235; *Ewell, Fixtures*, 21, 22. The sole basis of the claim that the articles here in controversy are fixtures arises from the fact that articles of that kind are necessary to the effective operation of the plant. But this is far from sufficient so long as they are loose and portable, have no special or peculiar adaptation to this particular plant, and are either adapted to general use or to use with equal efficiency in any like establishment. As remarked in a leading case: "If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm and a great variety of other articles subject to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures." *Teaff v. Hewitt*, 1 Ohio St. 511, 529, 59 Am. Dec. 634. We need not go beyond the decisions of this court upon the question. In *Oliver v. Lansing*, *supra*, the court said in passing upon property used in a theater: "We can conceive of no rule of the common law which would justify a court in holding that a piano, a desk and chair, carpets, curtains, baggage truck, a stepladder, a center table, or a settee, under the evidence, were real

property, although they may have been bought by the parties with the intention that they should remain permanently in this building, and be used in connection with it, until worn out and unfitted for service." Like conclusions have been reached with respect to articles similar to those here in controversy in *Hubbell v. East Cambridge Savings Bank*, 132 Mass. 447, 43 Am. Rep. 446; *Winslow v. Bromich*, 54 Kan. 300, 38 Pac. 275, 45 Am. St. Rep. 285; *Chase v. Tacoma Box Co.*, 11 Wash. 377, 39 Pac. 639; *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744, 53 Am. Rep. 1; *Scudder v. Anderson*, 54 Mich. 122, 19 N. W. 775.

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KINNEAR v. SCENIC RAILWAYS CO.

223 Pa. 390. 1909.

OPINION BY MR. JUSTICE MESTREZAT, January 4, 1909:

A corporation, whose name was subsequently changed to Luna Park Company, was incorporated February 1, 1905, "for the purpose of maintaining and operating a park for the amusement, entertainment and recreation of the public." By deed dated January 18, 1905, the company purchased a tract of land in the thirteenth ward of the city of Pittsburg, containing between sixteen and seventeen acres, on which it erected a number of buildings, improvements and devices, which were used for amusement purposes during the summers of the years 1906, 1907 and 1908. To secure the payment of \$75,000, the balance of the unpaid purchase money, the company gave a mortgage on the premises of even date with the deed.

The park company by an agreement dated January 31, 1906, leased to J. A. Miller, acting as agent for the appellant company, for the term of seven years, a small portion of the ground purchased by it as stated above, "including the Japanese theater building now located in said park," for the purpose of constructing thereon and operating a scenic railway, an amusement device generally known as "Leap the Dips." The consideration was twenty-seven and one-half per cent of the gross receipts derived from the operation of the railway, settlements to be made daily. The agreement provided, *inter alia*, that the park company at its option might appoint a cashier to receive all moneys from sale of tickets; that the plant should at all times be subject to the inspection and approval of the park company; that the buildings and appliances were to revert to the park company upon the termination of the lease; also that the park company should have the right to buy the leasehold, with all the buildings and appliances erected and contained thereon, at the end of any park season during the term of the lease, provided the purchase was made within sixty days from closing date of any park season, with a reduction of ten per cent of the original cost for each season during which

the railroad was operated. The railway was duly constructed by Miller and until the season of 1908 was operated by him and the appellant company, to whom the lease was assigned by Miller.

The park company borrowed \$70,000 of the Keystone National Bank and secured the payment of it by a second mortgage upon the park property, dated September 5, 1906, and duly recorded. The cashier of the bank knew of the lease to Miller at the time the mortgage was taken, but did not know that it had been assigned to the appellant company.

As found by the trial judge, "Luna Park is an assemblage of amusement places and devices open to the public, which are changed from time to time to meet the desires of the patrons of the park, an admission fee being charged to the park as well as to the different amusements contained within the park."

In a proceeding on the mortgage held by the Keystone National Bank against the park company, the property was sold and purchased by plaintiff, the appellee, and conveyed to him by the sheriff by deed dated March 2, 1908. In a similar proceeding on the purchase money mortgage, the property was also sold and purchased by the appellee, and the sheriff conveyed it to him by deed dated May 4, 1908. The appellee holds the property as agent and trustee for the Keystone National Bank, whose employees and servants have been in possession of the park and all the property since it became the purchaser under the first sale by the sheriff.

The appellant company claiming the right to remove the scenic railway which it erected on the leased premises, the appellee filed this bill to restrain the appellant from interfering with or attempting to remove the buildings and improvements located on the premises, and erected or constructed by the appellant company. The appellee claims that he is the owner of the property by virtue of his purchase in the proceedings on the mortgages, and the appellant company contends that the lease was ended by the foreclosure of the first mortgage and that therefore it has the right to remove the property in dispute as trade fixtures of a tenant.

The court below found all the material facts, and, *inter alia*, the following: "The Scenic Railway is one of the best patronized and most profitable amusement features of the park. It is substantially built, with superstructure consisting of uprights and supports imbedded in the earth to a distance below the frost line, and with the platforms attached to the pavilion, or Japanese theater building, which is used as a ticket office and station for entrance to and exit from the cars. . . . The construction of a scenic railway is such that its superstructure can, without serious injury to the materials used, be taken down and reconstructed in another location. The removal and re-erection of such structures is, however, of infrequent occurrence."

The learned judge held that if the lease had simply given Miller the right to enter upon and erect the scenic railway without any other provisions affecting the question, that the property in dispute might be considered a trade fixture and held to be subject to the law governing such property; but he was of the opinion that the lease determined the rights of the parties and that it "clearly indicates an intention that the railway and its appliances should be permanent fixtures, and remain in the park until the termination of the lease, when they should become the absolute property of the park company." He, therefore, held that the title to the property passed to the appellee as purchaser of the land under the mortgages. The injunction was granted as prayed for in the bill, and the defendant has taken this appeal.

We think the learned trial judge was correct in holding that the property in dispute was a part of the realty and passed to the purchaser at the sale made under the proceedings on the mortgage. The character of the property, whether personal or a part of the real estate, must be determined by the covenants contained in the agreement of January 31, 1906. That agreement, read in the light of all the circumstances, leaves no doubt of the intention of the parties as to the character of the property. As observed above, the Luna Park Company was incorporated for the purpose of operating an amusement park. The sixteen acres of land owned by the corporation were purchased to carry out the purpose of the corporation. The object the company had in obtaining title to the land in Pittsburg was to make it a place "for the amusement, entertainment and recreation of the public." The company erected various devices on the premises for the amusement of the public and has continuously operated the property as a place of amusement since the erection and construction of the buildings.

In view of the purpose for which the charter was obtained by the Luna Park Company and of the fact that the land was purchased by the company to carry out the purpose, there can be no difficulty in determining that under the terms of the lease it was the intention of the lessor and lessee that the scenic railway should be annexed to the real estate and become a permanent improvement in the park. The intention which controls and determines whether or not a chattel is annexed and becomes a part of the realty is the intention the parties had at the time it was placed upon the property. *Vail v. Weaver*, 132 Pa. 363; *Carver v. Gough*, 153 Pa. 225.

The lease was for seven years and was "of a space in said park for the purpose of constructing and operating thereon an amusement device." This was the purpose for which the Luna Park Company was chartered and its land was purchased. In leasing this space to Miller, therefore, it was for a purpose to which the lessor was devoting the balance of the park, and instead of the park company erecting



the device, it leased the space of ground to Miller for the like purpose of erecting and operating the railway for a limited time. Under the covenants of the lease, the scenic railway was practically under the control of the lessor like the other amusement devices constructed and operated on the park premises. As said by the court in *Thompson Scenic Railway Company v. Young*, 90 Md. 278: "It (scenic railway) was only available for pleasure resorts and had no general utility." After the lease expired, it could be utilized by the park company in the operation of the park as a place of amusement. By the terms of the lease the railway was attached to and became a part of the Japanese theater building on the park property and owned by the park company. The lessor company had the authority to appoint a cashier to receive all the moneys from the sale of admission tickets to the railway. The railway was at all times subject to inspection and approval of the park company. The consideration to be paid the company was twenty-seven and one-half per cent of the gross receipts from the operation of the railway, and it was to be paid daily. In addition to these provisions, it is specifically provided in the lease that the buildings and appliances erected by the lessee were to revert to the lessor upon the termination of the lease; and further that the lessor was to have the right to buy the leasehold with the buildings and appliances at the end of any park season during the continuance of the lease by paying ten per cent less than the original cost for each season during which the railway device had been operated. These several provisions of the lease leave no doubt whatever as to the intention of both parties at the time the instrument was executed and the scenic railway was erected on the park premises. The manifest purpose of the lessor was to add another attractive amusement to its park. As we have said, it could have constructed the railway; but it preferred to lease the space of ground and permit the lessee to construct and operate the device for a limited time. Instead of erecting a railway itself and receiving all the receipts from its operation, it gave the lessee the right to construct and operate it by paying the lessor a certain percentage of the receipts. At any time, however, the lessor had the right, by its cashier, to receive all the receipts from the operation of the device, and thereby practically control the financial part of the operation of the railway. As conclusively showing, however, that the improvement was to be permanent, it was agreed that the railway should become the property of the lessor at the termination of the lease. This stipulation, taken in connection with the other provisions of the lease, leaves no doubt of the intention of the parties at the time of the execution of the lease and the construction of the device. If, as claimed by the lessee, the railway was intended to be a trade fixture removable during the term, contrary to the implied covenant that it should remain during the term and the express covenant that it was to revert to the lessor

at the close of the term, the parties should have so stipulated in their contract. Presumably the parties intended exactly what they agreed to in the lease. They have there contracted that the device shall revert to the lessor at the end of the lease. Manifestly this stipulation was to enable the lessor to continue its use on the park premises. The lessor could advantageously utilize it at the very place it was constructed; and while it could be removed by the lessee, yet it would be at a loss to him. There was therefore a substantial reason why the device should remain on the premises at the place it was constructed, and this must be considered in determining the intention of the parties as disclosed by their agreement.

The leasehold could be purchased by the lessor at the end of any park season during the continuance of the lease. This does not show, however, that it was not the intention of the parties that the railway should not permanently remain in the park. It is simply a stipulation in the agreement that the leasehold acquired by the lessee shall become the property of the lessor by the payment of the stipulated sum. The lessor could avail itself of this option, or it could await the termination of the lease and pay nothing. The lessee could not remove the device on failure of the lessor to exercise the option. The lessee company was compelled to allow it to remain on the park premises whether the lessor exercised its option to purchase or not. An execution creditor of the lessee could not have levied upon and sold the railway, nor could the purchaser at such sale have removed it. That manifestly would have been a violation of the contract between the parties. The railway was not subject to the control of the lessee or its creditors to the extent of permitting its removal from the lessor's premises during a continuance of the term. The lessor had a right not only to have the railway remain on the park premises, but also to have it operated thereon so that it could receive its per cent of gross receipts during the lease. The removal of the property by the lessee or its creditors would have been a deprivation of this right which, on application of the lessor, the courts would prevent. The clear and undoubted purpose, therefore, was that the railway should remain on the park premises during the continuance of the lease and thereafter revert to the lessor.

As the agreement between the parties fixes the character of the improvement, we need not determine whether the device is a trade fixture and would have been removable during the term in the absence of an agreement declaring it to have been permanently annexed to the real estate. The learned counsel for the appellant company has furnished us an exhaustive brief, but none of the cases control this case in its favor. In the cases cited by the counsel in which there was an agreement, the court construed the contract to authorize the removal of the improvement. In *Thompson Scenic Railway Company v. Young*, 90 Md. 278, cited by the appellant, it

was specifically provided that the right and possession of the property should remain in the contractor (the claimant) and should not vest in the tenant for whom it was constructed until it was paid for. Hence it was held that on failure of the tenant without having paid for the railway, it did not become a part of the realty and belong to the landlord. *Hill v. Sewald*, 53 Pa. 271, was simply a hiring of chattels and there was no intention of annexing them to the freehold. In *Lemar v. Miles*, 4 Watts, 330, the fixture was held, under the contract, to be personal property, and that the event had not occurred which was to make it the property of the landlord. This case was followed in *Watts v. Lehman*, 107 Pa. 106. Both cases were between landlord and tenant. But even in such cases it has been distinctly ruled by this court in *Harris v. Kelley*, 10 Sadler, 185, that a creditor could not seize and sell the personal property placed by a tenant on leased property under a lease containing a clause providing that "all improvements erected or placed in said building to be and remain at the expiration of this lease the property of the lessor."

But the case in hand is not between landlord and tenant, but between one who holds title to the premises by virtue of a sale on a judgment obtained on a mortgage given prior to the lease, and a lessee of the mortgagor. We have been referred to no case which rules that the property in question would be held to be a trade fixture with the title in the lessee as against a prior mortgagee under the circumstances of this case. The same rule as to ownership of property in chattels annexed to realty prevails between a mortgagor and mortgagee as between a grantor and grantee (*Gunderson v. Swarthout*, [Wis.] 76 Am. St. Rep. 860; *McFadden v. Allen*, 134 N.Y. 489); and in either case it operates more strongly in favor of the mortgagee or grantee than the landlord where his title is assailed by a lessee.

We are clear that under the contract in this case the scenic railway was placed on the lessor's realty as a permanent improvement, and that such was the intention of both parties at the time of the construction of the device. The parties might have provided otherwise but they did not do so, and in the language of Chief Justice PAXSON in *Carver v. Gough*, 153 Pa. 225, 229: "While it may be a hardship to the appellant to deny his right to remove the buildings, we cannot see our way clear to come to any other conclusion consistent with the recognized rules of law."

The decree of the court below is affirmed.

## STATE v. MARTIN.

141 N.C. 832. 1906.

INDICTMENT against Reed Martin, heard by Judge R. B. PEEBLES and a jury, at the February Term, 1906, of the Superior Court of Forsyth.

The defendant, Reed Martin, was indicted with Henry Revels for wilfully and wantonly injuring an electric street car by breaking its windows with a rock. The grand jury, as appears from the endorsements on the indictment, returned "not a true bill" as to Henry Revels and a "true bill" as to Reed Martin.

WALKER, J. The learned counsel for the defendant in his argument before us relied chiefly upon the position that the street car was not personal property, and therefore that the alleged offense was not within the language or the meaning of section 3676 of the Revisal. He therefore contended that the judgment should be arrested. It does not appear from the indictment where the car was when it was injured by the defendant, but the evidence shows that it was then being operated on the track of the Fries Power Company in the city of Winston. The defendant's prayer for instructions is, perhaps, sufficient to raise this question, apart from the motion in arrest of judgment, though it does not distinctly point out this as a defect in the evidence and seems to have been intended to apply only to the question of variance. We will assume that the point is sufficiently presented, as it was clearly intended to be.

The method of changing property, personal in its nature, into realty is well settled in the law. Such property does not become realty by mere use in connection with the land, for if that were true, implements of husbandry, though used only for agricultural purposes, would thereby become a part of the land. Whether or not a chattel has become a part of the realty must to a great extent depend upon the facts of the particular case. The mere intention to make it a part of the freehold, though it may enter largely into the determination of the question of permanency (*Foot v. Gooch*, 96 N.C. 270), is not, by itself, sufficient for the purpose of making it so. There must be some kind of physical annexation of the thing to the land, though the nature and strength of the union is not material, if, in fact, it be annexed. The annexation is in some cases by gravitation alone or, in other words, the thing is kept in position by its own weight, as in the case of the planks laid down as the upper floor of a gin house and used to spread cotton seed upon, though not nailed or otherwise fastened to the building. *Bryan v. Lawrence*, 50 N.C. 337; *Latham v. Blakely*, 70 N.C. 368. In such a case the planks are necessary for the completion of the structure and essential to its occupation, use and enjoyment for the purpose of the trade or business to which it is adapted

and has been appropriated. *Latham v. Blakely*, *supra*; *Railroad v. Deal*, 90 N.C. 110. They have, as it were, a permanent and fixed position, and are in a certain sense stationary — not movable, so as to be in one place to-day and in another to-morrow. "The very idea of a fixture," says the court, in *Beardsley v. Ontario Bank*, 31 Barbour, at p. 630, "is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position. But that which becomes by annexation a part of the soil is something more than a fixture, and requires at least as much permanence as to constitute a fixture. The maxim, *Quicquid plantatur solo, solo cedit*, which tersely expresses the principle, makes the affixing of the chattel to the soil the test by which it is declared to belong to the soil. Hence, courts, in determining the questions that have arisen, have looked at the mode and intention of annexation, the object and customary use of the thing annexed, and in determining the intention, the character of the claimant has had its weight." And again at page 635, the court, in discussing the difference between railroad cars and a loom in a factory, says that the latter are permanently placed, although not strongly affixed, while rolling stock is incapable of permanence or of being annexed in any one place, as it is intended for and the whole use is in its locomotive facilities, and the court then proceeds: "The term by which it is ordinarily designated, 'rolling stock,' implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of the railroad, but is not a part of the railroad itself. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and everything is ready for the reception of the locomotives and cars; it is equipped when the rolling stock and all other necessary appliances and facilities for business are finished and put upon it for use." That seems to be the leading case in the books. The opinion delivered by Judge ALLEN (afterwards judge of the Court of Appeals) is devoted to a careful discussion of the subject and goes fully into the authorities. It is well considered and has been followed as a controlling precedent in several subsequent cases. A decision by the same court, in which the question is also learnedly and ably treated and the same conclusion reached, is *Stevens v. Railroad*, 31 Barbour, 590. The Court of Appeals of New York has expressly affirmed those cases and approved the principles upon which they were decided. *Randall v. Elwell*, 52 N.Y. 521; *Hoyle v. Railroad*, 54 N.Y. 314. To the same effect are *State Treasurer v. Railroad*, 28 N.J.L. 21, and *Williamson v. Railroad*, 29 N.J. Eq. 311. In the last cited case it is said, at pages 329 and 331, "The criterion for determining whether property ordinarily regarded as personal property becomes annexed to and part of the realty, is the union of three requisites: 1. Actual annexation to the realty or something appurtenant thereto

2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated. 3. The intention of the party making the annexation to make a permanent accession to the freehold. Tested by the foregoing criterion, it is manifest that the rolling stock of a railroad must be regarded as chattels which have not lost their distinctive character as personalty by being affixed to and incorporated with the realty. It is true that engines and cars are adapted to move on the track of the railroad, and are necessary to transact the business for which the railroad was designed. But unattached machinery in a factory, the implements of husbandry on a farm, and furniture in a hotel, are similarly adapted for use in the factory, on the farm, or in the hotel, and are equally essential to the profitable prosecution of the business in which they are employed. When regard is had to the fundamental and necessary condition under which the law permits chattels to become a part of the realty, engines and cars and the rolling stock of a railroad utterly fail to answer the requirement of the law." It does not appear in this case that the power company owned the land on which its rails were laid and over which its cars ran. Indeed, it must be that it did not, and this is the fair inference. The only right it had, in respect to the land, was a license to use the streets of the city for the operation of its line of railway. This being so, it had no land of its own to which it could annex its personal property and thereby convert it into realty. Having only a right to use the land for a definite purpose and subject to its joint occupation and use by the city and its citizens, so far as they did not interfere with or obstruct the use by the company, we cannot suppose that either of the parties intended that the nature of the property, that is the cars, should be changed from personalty into that of realty. There is no valid reason for holding that such a change was contemplated or that it was wrought by a mere use of the streets in the manner already described. The cars were in no way actually and physically attached to the realty, nor were they constructively so annexed, the latter method implying that there exists both adaptation to the enjoyment of the land and localization in use as obvious elements of distinction from mere chattels personal, which are movable and intended to be so. While there is here an adaptation to use, there is no annexation, no immobility from weight and no localization in use. Were the same contrivance adopted by a tenant for the purpose of carrying on his trade upon leased lands, his right to remove both cars and rails would seem to be beyond question. *Hoyle v. Railroad*, *supra*; *Moore v. Valentine*, 77 N.C. 188; *Overman v. Sasser*, 107 N.C. 432; *Elwes v. Mawe*, 3 East. 38 (2 Smith's Leading Cases, 9 ed. 1888, p. 1423). We conclude that the cars were personalty so as to render a wilful and wanton injury to them criminal under section 3676 of the Revisal.

NOTE. — Other cases in which rolling stock has been held to be personalty are *Neilson v. Iowa R.R. Co.*, 51 Iowa 184; *Williamson v. N.J. Southern R.R. Co.*, 29 N.J. Eq. 311, 327; *Hoyle v. Plattsburgh R.R. Co.*, 54 N.Y. 314; *Chicago Ry. Co. v. Borough of Ft. Howard*, 21 Wis. 44.

See, *contra*, *Palmer v. Forbes*, 23 Ill. 301.

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### HOOK v. BOLTON.

199 Mass. 244. 1908.

TORT for the conversion of certain articles alleged by the plaintiff to be chattels but claimed by the defendant as fixtures annexed to a dwelling house numbered 86 on Bloomfield Street in Boston which she had purchased at a foreclosure sale. Writ in the Municipal Court of the City of Boston dated June 27, 1904.

On appeal to the Superior Court the case was tried before WHITE, J. At the close of the evidence the plaintiff asked the judge to give to the jury the following instructions:—

"1. I rule that the gas fixtures and gas chandeliers in the house were personal property as matter of law, and did not pass by the mortgage, and that the plaintiff is entitled to recover damages for their value on June 13, 1904.

"2. Ordinary steam radiators, detachable from the pipes, and suitable for use in any building, are personal property as matter of law. If you find that the radiators in question were radiators of this sort, I rule that they did not pass by the mortgage and the defendant got no title to them, and that the plaintiff is entitled to recover as damages their value on June 13, 1904.

"3. Gas stoves of the kind described in the testimony in this case are personal property as matter of law; they did not pass by the mortgage; the defendant got no title to these stoves, and the plaintiff is entitled to recover as damages their value on June 13, 1904.

"4. Ordinary portable kitchen stoves or ranges, used principally for cooking, with hot-water fronts, and with stovepipes running into the chimneys, are personal property as matter of law; and stoves or ranges of this character did not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904.

"5. Ordinary window shades, running on rollers, and detachable from their sockets, are personal property as matter of law; and window shades of this character do not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904.

"6. Window screens and screen doors of the ordinary kind, made

for temporary use during the summer months to keep out flies and other insects, bought ready made without being specially manufactured to fit this house, and suitable for use on any other house of a generally similar character, are personal property as matter of law; and window screens and screen doors of this character did not pass to the mortgagee or the defendant under the mortgage, but the plaintiff is entitled to recover as damages for their conversion their value on June 13, 1904."

The judge refused to give the instructions requested, and left it to the jury to determine whether the articles referred to in the requests for instructions had become a part of the real estate by being annexed thereto, or remained personal property.

The jury returned a verdict for the plaintiff in the sum of \$23.40, including interest since June 13, 1904; and the plaintiff alleged exceptions.

The case was argued at the bar in December, 1907, before KNOWLTON, C.J., HAMMOND, LORING, BRALEY, and RUGG, JJ., and afterwards was submitted on briefs to all the justices.

KNOWLTON, C.J. This is an action of tort to recover the value of certain articles annexed to a dwelling house and used with it. The defendant claimed title under the foreclosure of a mortgage of the real estate. The plaintiff requested the presiding judge to rule as to several classes of these articles that they were personal property and not fixtures.

The principles of law applicable to cases of this kind have been stated many times in recent opinions of this court. In *Hopewell Mills v. Taunton Savings Bank*, 150 Mass. 519, 521, 522, is this language: "A machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it and to be used with it to promote the object for which it was erected or to which it has been adapted and devoted, an article intended not to be taken out or used elsewhere, unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place." See also *Wentworth v. Woods Machine Co.*, 163 Mass. 28; *Ridgeway Stove Co. v. Way*, 141 Mass. 557; *Southbridge Savings Bank v. Mason*, 147 Mass. 500; *Southbridge Savings Bank v. Stevens Tool Co.*, 130 Mass. 547; *Pierce v. George*, 108 Mass. 78; *Leigh v. Taylor*, [1902] A. C. 157, 161. Of course the rule is the same as to articles attached to a dwelling house as it is as to machines put into a factory. As bearing upon the question, "the nature of the article and the object, the effect, and the mode of annexation are all to be considered." Generally, the question whether an article attached to a building belongs to the real estate is a mixed question of law and fact.



The application of these principles to the facts of the present case require us to sustain the rulings of the judge as to all the articles except the gas stoves and the curtains.

It is contended that the gas fixtures should have been held to be personal property as matter of law, on the authority of *Guthrie v. Jones*, 108 Mass. 191, and *Towne v. Fiske*, 127 Mass. 125. In the opinion in each of these cases there is language which goes beyond the decision, and tends to support the plaintiff's contention. The later case merely adopts the language of the earlier one. But in each of the cases, the question before the court was whether the gas fixtures, upon the evidence, could be ruled as matter of law to be a part of the realty. The decision was simply that they could not. We have not been referred to any case in which the court has decided that gas fixtures attached to a building and used with it are, as matter of law, personal property. They may or may not be, according to the facts and circumstances which tend to show that they do or do not belong to the building, and were or were not intended to remain with it as a part of it. As to the gas fixtures, the steam radiators, the kitchen range and the window screens and door screens, the judge was right in submitting the questions to the jury, with proper instructions. *Allen v. Mooney*, 130 Mass. 155; *Ridgeway Stove Co. v. Way*, 141 Mass. 557; *Jennings v. Vahey*, 183 Mass. 47.

The gas stove and the window shades, running on rollers, stand differently. It may be that certain apartment houses, or other dwelling houses designed for occupation by tenants, are constructed in some of our cities and intended to be used in such a way that the introduction of such gas stoves and window shades by the owner, to go with the house as a part of it, for use by the tenants, may hereafter be proved at a trial. See *Jennings v. Vahey*, 183 Mass. 47. It is entirely possible that the mode of construction and use of certain kinds of houses may be such that articles of this kind will be made a part of the house for permanent retention and use in the places where they are put. If it becomes a practice to build and use houses in such a way these articles may be put in as fixtures. As to the application of the law, we agree with Lord HALSBURY in what he said in *Leigh v. Taylor*, [1902] App. Cas. 157, 161, in regard to the decisions of the courts: "The facts have been regarded in different aspects, according to the fashion of the times, the mode of ornamentation, and the mode in which houses were built, and the degree of attachment which from time to time became necessary or not, according to the nature of the structure which was being dealt with."

In the present case we discover no evidence to warrant the jury in finding that the gas stove and window shades were a part of the realty. So far as appears, the building in question was an ordinary dwelling house for a single family, and there is nothing to show that it was intended to be occupied or used differently from common

dwelling houses. These were ordinary articles of merchandise, not peculiarly fitted for use in this house, were of a standard pattern, loosely affixed and easily removed, and were of the nature of personal property. They were put into the house by the mortgagor, and were of a kind of articles which usually are carried away by an outgoing occupant. There was nothing to show that the owner intended to annex them as a permanent addition to the real estate. We think upon the evidence, the judge was wrong in submitting to the jury the question whether they were a part of the realty.

*Exceptions sustained.*

NOTE. — See, *accord*, *Cunningham v. Seaboard Realty Co.*, 67 N.J. Eq. 210.

In *Capehart v. Foster*, 61 Minn. 132, the court said (p. 133): "During all of said time these gas fixtures were screwed to the ends of the gas pipes projecting from the walls and ceilings, and can be readily unscrewed. It is held by the great weight of authority that, under such circumstances, such gas fixtures are not a part of the realty, even as between vendor and vendee or mortgagor and mortgagee; that they are merely a part of the furniture of the room, — a substitute for the lamps and lamp holders, candlesticks and chandeliers, formerly used to hold candles. *McKeage v. Hanover Ins. Co.*, 81 N.Y. 38; *Jarechi v. Philharmonic Soc.*, 79 Pa. St. 403; *Towne v. Fiske*, 127 Mass. 125; *Montague v. Dent*, 10 Rich. Law, 135; *Rogers v. Crow*, 40 Mo. 91; *Ewell*, Fixt. 299. While this doctrine is rather doubtful in principle, it is too well established as the law of the country generally to be now overturned."

Electric light fixtures were held to be realty in *Canning v. Owen*, 22 R.I. 624.

Hot-air furnaces were held to be realty in *Stockwell v. Campbell*, 39 Conn. 362; *Thielman v. Carr*, 75 Ill. 385. (But *cf. Clark v. Skelton*, 208 Mass. 284.) So, of a boiler, piping and radiators used for heating. *Dame v. Wood*, 75 N.H. 38. So, of a hot-water heating apparatus. *Young v. Hatch*, 99 Me. 465. So, of steam radiators. *Capehart v. Foster*, 61 Minn. 132. (But see, *contra*, *National Bank v. North*, 160 Pa. 303.) So, of "dog grates." *Monti v. Barnes*, [1901] 1 K.B. 205.

Storm windows and doors were held to be realty in *Roderick v. Sanborn*, 106 Me. 159; *Fish Co. v. Young*, 127 Wis. 149. But see, *contra*, *Peck v. Batchelder*, 40 Vt. 233.

Bathtubs were held to be realty in *Cohen v. Kyler*, 27 Mo. 122.

Window screens were held to be realty in *Cunningham v. Seaboard Realty Co.*, 67 N.J. Eq. 210.

Carpets and curtain poles were held to be personalty in *Manning v. Ogden*, 70 Hun (N.Y.) 399.

A piece of ornamental statuary, on the grounds surrounding a dwelling house, was held to be realty in *Snedeker v. Warring*, 12 N.Y. 170.

## CHILDRESS v. WRIGHT.

2 Cold. (Tenn.) 350. 1865.

MILLIGAN, J., delivered the opinion of the court.

This case originated before a Justice of the Peace of Davidson County. The warrant is in trespass, and the damages are claimed for the alleged unauthorized removal of a small wooden house, which a sutler had erected on the lands of the defendant. The magistrate gave judgment for the plaintiff below, and the defendant appealed to the Circuit Court, when, upon the agreement of the parties, the cause was tried by the presiding judge, without the intervention of a jury. The justice's judgment was affirmed, and an appeal prosecuted to this court.

The facts necessary to be noticed, are as follows, viz: During the time this part of the State was occupied by the Federal army, a regiment of soldiers encamped on the lands of the defendant, and a sutler built a house thereon, which afterwards he sold to the defendant in error for forty-five dollars. The building was constructed of wood, and the planks, which constituted a part of it, were nailed to the upright posts and studding. The freehold upon which it was erected, was owned by the defendant; and after the removal of the troops, he declared his purpose to disregard the sale, and to appropriate the building to his own use. And thereupon he was told by the defendant in error, she would sue him. He disregarded this admonition, and hauled off the plank and applied them to other purposes. And this action is brought to recover the value of the house.

It is insisted, under this state of the facts, that the sale by the sutler to the plaintiff was utterly void, and communicated no title to the house; that it was a fixture, and attached to the freehold. The law on that subject, we think, is well settled. By the common law, everything affixed to the freehold was subject to the law of the freehold. But in more modern times, the rigor of this rule has been greatly relaxed in favor of tenants, and fixtures erected for the benefit of trade. But in the case of *DeGraffenreid v. Scruggs*, 4 Hum. 454, this court said: "As between executor and heir, and between the vendor and vendee, the original rule prevails, and whatever is affixed to the freehold passes with it." See, also, 2 Kent's Com. 345-46.

If such is the rule between executor and heir, and vendor and vendee, much more is it applicable between a wrongdoer and the rightful owner of the freehold. The house in controversy, so far as the record discloses the facts, was erected without the permission of the owner of the freehold, or without any order of the military commander encamping his troops on the land; and when once erected,

and attached to the freehold, it passed under the right of the soil, and could not be sold and transferred by the sutler who erected it.

The judgment is reversed, and a new trial awarded.

NOTE. — See, *accord*, *Williams v. Vanderbilt*, 145 Ill. 238, 251; *Goddard v. Bolster*, 6 Me. 427; *First Parish in Sudbury v. Jones*, 8 Cush. (Mass.) 184; *Mitchell v. Bridgman*, 71 Minn. 360; *Stillman v. Hamer*, 8 Miss. 421; *Doscher v. Blackiston*, 7 Oreg. 143; *Albert v. Uhrich*, 180 Pa. 283; *Huebschmann v. McHenry*, 29 Wis. 655. Cf. *Pennybecker v. McDougal*, 48 Cal. 160 (erections on government land).

If B, having the power of eminent domain, erects structures on the land of A, and later condemns such land, B is not obliged to pay A for the structures so erected. *McClarren v. Jefferson School Township*, 169 Ind. 140; *Justice v. Nesquehoning R.R. Co.*, 87 Pa. 28.

If C takes the chattels of B, and affixes them to the realty of A, they become the property of A. *Peck-Hammond Co. v. Walnut Ridge School District*, 93 Ark. 77; *Voorhees v. McGinnis*, 48 N.Y. 278. But not if they may be removed from the realty without doing material injury to the realty. *Shoemaker v. Simpson*, 16 Kan. 43; *Cochran v. Flint*, 57 N.H. 514.

B may wrongfully take the chattels of A, and so annex them to B's land that they cease to be the property of A. *Salter v. Sample*, 71 Ill. 430; *Ricketts v. Dorrel*, 55 Ind. 470 (p. 167, *supra*); *Peirce v. Goddard*, 22 Pick. (Mass.) 559. But cf. *Eisenhauer v. Quinn*, 36 Mont. 368.

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### DAME v. DAME.

38 N.H. 429. 1859.

PETITION FOR A NEW TRIAL. The petition sets forth that, in 1842, Timothy Dame was possessed of a tract of land in Farmington, containing twelve acres, more or less, of which the boundaries are stated. In that year the petitioner, Edward Dame, by permission of said Timothy Dame, erected on said tract a dwelling-house and barn, of the value of \$500.

On the 13th of January, 1853, Timothy Dame conveyed said land by deed of warranty to Daniel W. Dame and Isaac Worster, the petitionees, reserving the house and barn, erected as aforesaid by the petitioner, with the right to remove the same.

October 26, 1855, said Timothy, in consideration of one dollar, released to said Dame and Worster his right, title and interest in the house and barn-aforesaid.

On the 2d of January, 1854, Dame and Worster procured from

the Court of Common Pleas for the county of Strafford a writ of attachment, and caused it to be served on the petitioner, and therein demanded of him a certain messuage, it being the same land before described. By accident, mistake or misfortune, the attorneys employed by the petitioner filed a plea or answer, in which they claimed for him a title to an undivided moiety of said land, and disclaimed the residue. The suit was continued from that term till March, 1855; at which term, through accident, mistake or misfortune, a default was entered and judgment rendered for the plaintiffs, a writ of possession issued, and the petitioner was turned out of possession of said buildings, and deprived of the right of possession and right of removal of the same. He therefore prays a new trial, or other relief.

The allegations of the petition are substantially sustained by the evidence.

BELL, J. The rules of the common law, relating to the rights of lessor and lessee, in buildings and other structures erected by the lessee upon the property leased, and in such things as are annexed and affixed to any buildings or structures thereon, are liable to be changed and modified in any way by the agreements made by the parties on the subject; and, so far as such agreements extend, the question is no longer what is the common law, but what have the parties agreed. Am. & Fer. on Fix. 97, 103, 104; Broom's Maxims 280; *Dubois v. Kelley*, 10 Barb. 496; 2 Smith's L. C. 87; *Wall v. Hinds*, 4 Gray 273; Smith's L. & T. 352; *Foley v. Addenbrooke*, 13 M. & W. 174.

It is in accordance with this principle that it has been settled by many decisions, that where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of the person who erected it. In such case it is immaterial what is the purpose, size, material, or mode of construction of such building. *Van Ness v. Pacard*, 2 Pet. 137; Taylor L. & T., sec. 546. It is merely personal, and is governed by the same rules as any other article of personal property; as, for instance, a pile of lumber, left by consent of the owner of the land upon his premises. *Smith v. Benson*, 1 Hill 176.

This principle has been recognized and applied in *Wells v. Bannister*, 4 Mass. 514; *Doty v. Gorham*, 5 Pick. 489; *Marcy v. Darling*, 8 Pick. 283; *Ashmun v. Williams*, 8 Pick. 404; *Rogers v. Woodbury*, 15 Pick. 156; *Wall v. Hinds*, 4 Gray 273; and see *Washburn v. Sproat*, 16 Mass. 449; in *Osgood v. Howard*, 6 Gr. 452; *Russell v. Richards*, 1 Fairf. 429; *Hilborn v. Brown*, 3 Fairf. 162; *Tapley v. Smith*, 18 Me. 12; *Doak v. Wiswell*, 3 Heath 572; *Fuller v. Tabor*, 4 Heath 519; *Pullen v. Bell*, 5 Heath 314; in *Barnes v. Barnes*, 6 Vt. 388, with

which *Leland v. Gassett*, 17 Vt. 403, is not inconsistent; in *Curtis v. Hoyt*, 19 Conn. 154; in *Smith v. Benson*, 1 Hill 176; *Smith v. Jenks*, 1 Denio 580; *Goddard v. Gould*, 14 Barb. 605; *Mott v. Palmer*, 1 Comst. 564; *Ombury v. Jones*, 21 Barb. 520; in *Brearily v. Cox*, 4 Zab. 287; in *McCracken v. Hall*, 7 Ind. 30; in *Stillman v. Homer*, 7 How. (Miss.) 421; and in *Haven v. Emery*, 33 N.H. (2 Fogg) 66.

If in such case the owner of the land resists the removal of such building, or otherwise converts it to his own use, he will be liable in trover for the value of it, either to the builder or his assignee. *Osgood v. Howard*, 6 Gr. 452; *Russell v. Richards*, 1 Fairf. 429; *Wansborough v. Morton*, 4 A. & E. 884; *Hilborn v. Brown*, 3 Fairf. 162; *Smith v. Benson*, 1 Hill 176; *Fairbarn v. Eastwood*, 6 M. & W. 679; *Tapley v. Smith*, 18 Me. 12.

But a mere refusal or neglect to deliver it, or to remove it from his premises, upon a demand for that purpose, will not be evidence of a conversion, because the owner of the land owes no duty to the builder, but not to oppose the removal.

If the owner of the land withdraws his consent that the building should remain, or puts an end to the estate at will of the owner of the building in it, the latter may enter upon the land, and peaceably remove the building, doing no unnecessary damage to the owner, within a reasonable time, without being a trespasser; 1 Taylor L. & T. 369; *Weston v. Woodcock*, 7 M. & W. 14; *Woods v. County of Cheshire*, 32 N.H. (1 Fogg) 424; *Doty v. Gorham*, 5 Pick. 489; *Rising v. Stanard*, 17 Mass. 287; *Ellis v. Paige*, 1 Pick. 49; because the proprietor of goods and chattels has authority by law to enter the land of another upon which they are placed, and remove them, provided they are there without his default. Ham. N. P. 169; Bac. Ab., Tresp., F, 1; 2 Rolle's R. 55; 2 Rolle's Ab. 566, (I, p. 9.); Cro. El. 329; 1 Swift Sys. 525.

But if in such case the owner of the building suffers it to remain an unreasonable time, or if his right to continue it terminates by his own act before its removal, it is his fault that it remains afterward; and if he enters to remove it, he will be liable in trespass for all damage done by him to the owner of the land, but not for the value of the property removed. *Webb v. Stanard*, Palm. 71; *Mumford v. Whitney*, 15 Wend. 386; *Miller v. Railroad*, 6 Hill 64.

If the owner of the land conveys his interest, it will operate as a revocation of the license to continue the building upon it; but the owner of the building will not be affected by it till notice, either actual or constructive, of the revocation. *Dubois v. Kelly*, 10 Barb. 496; *Rising v. Stanard*, 17 Mass. 286.

It has even been held that no interest in the building passes by the conveyance, whether the purchaser had notice of the position of the building or not; *Russell v. Richards*, 1 Fairf. 429; *Dubois v. Kelly*, 10 Barb. 496; *Smith v. Benson*, 1 Hill 176; and if he is wronged,

his remedy is upon the covenants in his deed; *Mott v. Palmer*, 1 Comst. 564; but on this point we express no opinion.

In the present case it may be fairly inferred, nothing being stated to the contrary, that the house and barn here in question were constructed in the usual manner, and were, therefore, *prima facie* a part of the real estate; but they were erected by the petitioner upon the land of his father, by his express assent and permission, and upon an understanding, almost necessarily implied in such permission, and here proved by the reservation of the father's deed, of the right to remove these buildings. They did not, therefore, become part of the real estate, but remained merely personal chattels. By the father's deed to the defendants, the real estate alone passed, but these chattels did not, because it purported to convey the real estate alone; because the father had no title in them that he could rightfully convey, and because they were reserved in the first deed, and the second granted nothing but a release of his claim upon them, under the reservation of the first. The conveyance to the defendants upon notice put an end to the license to continue these buildings on the land sold, or to remove them; but the law gave to the petitioner a right to retain them, and to remove them during a reasonable time after notice of that sale. After the lapse of such time they still remain the property of the petitioner, but as they continue upon the land by his own fault, he cannot enter upon the land to remove them without a trespass; but if he does enter, he will be liable only for the damage which he does, and which the buildings have caused, and not for the value of them.

On the other hand, if the defendants resist their removal, or convert the buildings to their own use, they will be answerable to the petitioner in trover for their value; but as they are not bound to remove them or deliver them, or even to assent to their removal, they will not be made liable by a mere demand and refusal.

The action brought by the defendants was for the recovery of the land alone. The judgment rendered in it could not affect the petitioner's title to his chattels then upon the land, whether they were there by right or by wrong; nor could it in any way affect the merely personal right of the petitioner to remove them, or to recover their value, if they were withheld from him. The right to enter for the purpose of removing this property gives no seizin or possession of the land, and is not even an interest in land, within the statute of frauds. *Woods v. County of Cheshire*, 32 N.H. (1 Fogg) 424. Such a right constitutes no defence in a real action, and we have found no plea in which any similar right, or even a right to an easement, has been attempted to be set up as a defence to a real action. As the right of the petitioner to these buildings cannot avail in defence of the action, he cannot be benefited by a new trial.

The license to erect these buildings, and to occupy them on the

father's land, constituted a lease at will. If it could be deemed a lease from year to year, it would continue till terminated by a notice to quit, notwithstanding the deed to the defendants (*Doty v. Gorham*, 5 Pick. 489; *Birch v. Wright*, 1 D. & E. 378; *Madden v. White*, 2 D. & E. 159); but as there was no rent reserved, or time of payment limited, it must be deemed a tenancy at will strictly (*Taylor L. & T.* 36; 1 Swift Sys. 95; *Wright v. Beard*, 13 East 210); and was terminated by the sale of the property (*Taylor L. & T.* 37; *Ball v. Cullimore*, 2 M. C. & R. 120; 1 Swift Sys. 90).

It is not necessary to discuss the question whether a new trial will be granted, where the party had due notice of the suit, and employed counsel, and was defaulted with the knowledge and assent of his counsel, but through some fault or mistake of the counsel. It would seem that a very clear case of accident, mistake or misfortune must be shown to induce the court to interfere.

*Petition dismissed.*

NOTE. — By the weight of authority, such an agreement, as that between Edward Dame and Timothy Dame, is effective against a prior mortgagee of the realty. See *Merchants' Bank v. Stanton*, 55 Minn. 211. See, *contra*, *Clary v. Owen*, 15 Gray (Mass.) 522.

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### BANK v. WOLF.

114 Tenn. 255. 1904.

On the twenty-fourth of January, 1899, the Fred W. Wolf Company entered into a contract with the Consumers' Ice, Coal & Cold Storage Company, whereby the former sold to the latter machinery to the value of \$14,600, payable in installments, evidenced by sundry promissory notes. By the terms of the contract the machinery was to remain the property of the selling company until paid for. There still remains unpaid a balance of about \$1800.

The machinery consisted of a condenser, an engine, oil trap, all very heavy articles, and sundry pipes, necessary for the operation of an ice factory. The condenser and engine were placed upon brick foundations and bolted thereto. The oil trap was likewise bolted to the floor. The pipes were connected with the condenser, and thence, through the building, with other parts of the machinery of the plant which was already in place at the time the contract was made, the latter being a part of the old equipment of the factory. All of this machinery was connected together in such a way as to form a complete and homogeneous system. The condenser, the engine, and the oil trap could be taken out of the building, without serious injury thereto, by taking off the taps and withdrawing the bolts. The other



connections could then be taken out, also without serious injury thereto.

At the time, however, that this machinery was put in place, it was intended by the parties that it should be permanently attached to the freehold, subject only to the failure to comply with the condition of payment. None of the machinery furnished under the contract and so placed in the building could be withdrawn without seriously impairing the efficiency of the plant. The machinery was sold by the Fred W. Wolf Company to the ice company for the purpose of being attached to the freehold in the manner in which it was attached, and it was so fastened thereto with the knowledge and consent and aid of the said company.

On April 1, 1901, the Consumers' Ice, Coal & Cold Storage Company executed a mortgage on the whole plant to the Union Bank & Trust Company, to secure an issue of \$15,000 of bonds, and on January 1, 1902, a second mortgage was placed thereon, in favor of the Union Bank & Trust Company, as trustees, to secure \$35,000 of bonds. These mortgages were taken upon the property in the belief that the machinery above referred to constituted a part of the plant, and that the whole was subject to mortgage. Neither the trustee nor the bondholders had any knowledge or notice of the fact that the Fred W. Wolf Company had retained title to the machinery.

The ice company having failed, the trustee was proceeding to foreclose the mortgages, whereupon the Fred W. Wolf Company brought its replevin suit to recover the machinery. Then the present bill was filed to enjoin that suit, and to test the question of priority between the parties.

The chancellor rendered a decree in favor of the complainants, upholding the priority of the mortgagees, and thereupon the seller, the Fred W. Wolf Company, appealed to this court, and has assigned errors.

MR. JUSTICE NEIL. . . . When the facts contained in the statement are viewed in the light of the foregoing decisions, we think it cannot be doubted that the purpose of the ice company in placing the machinery in the building was to permanently enhance the value of the property and to make it a part of the realty. It is equally clear that this purpose was concurred in by the seller of the machinery, subject only to the condition that such seller should have a right to withdraw it in case the purchase money notes should not be paid.

The question to be determined is whether this secret condition, known only to the seller and buyer, should be held operative against an innocent purchaser of the realty.

We think this question should be decided in the negative, for two reasons. The first of these reasons is based upon the principle that, where one of two innocent persons must suffer, that one should bear the loss whose conduct or act placed it in the power of a third party

to impose upon or deceive another. The second reason is to be found in the policy of our law in respect of real estate titles. That policy is opposed to secret liens, and requires that the public records shall contain evidence of all liens and incumbrances. An opposite view would soon involve titles to realty in great confusion, and result in needless depreciation of land values, since a vendee would search the records in vain for a secret agreement between the vendor and some prior owner in respect of the fencing or houses, or mills containing machinery, or other erection upon the land. The purchaser desiring to buy land would justly suffer under the apprehension of some such secret understanding between prior parties, whereby, after paying for the land, he might be deprived, without his consent and without compensation, of a considerable portion of the value of the property that he supposed he was buying.

Now, in the present case, it appears that the machinery was so placed in the factory as to be *prima facie* a part of the realty itself, and the whole erection, composed of the building and the machinery, was in the possession of the owner of the land. The trustee and bondholders under the two mortgages or trust deeds were justified from the appearance of things in assuming that the machinery was in truth a part of the land, and in taking such machinery into estimation in determining the amount of money which they would advance upon the entire property. Now to deprive them of this security in behalf of the seller of the machinery, who retained the title merely as security, and by a secret or unrecorded writing between such vendor and the purchaser of the machinery, would be, in our judgment, to sacrifice the substance of justice to its mere form.

NOTE. — See, *accord*, *Landon v. Platt*, 34 Conn. 517; *First National Bank of Joliet v. Adam*, 138 Ill. 483; *Bringholff v. Munzenmaier*, 20 Iowa 513; *Southbridge Savings Bank v. Exeter Works*, 127 Mass. 542; *Rabeke v. Baer*, 115 Mich. 333; *Climer v. Wallace*, 28 Mo. 556; *Haven v. Emery*, 33 N.H. 66, 69; *Brennan v. Whitaker*, 15 Ohio St. 446; *Muir v. Jones*, 23 Oreg. 332; *Powers v. Dennison*, 30 Vt. 752; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U.S. 267; *Hobson v. Gorringe*, [1897] 1 Ch. 182.

See, *contra*, *Adams Machine Co. v. Interstate Building Ass'n*, 119 Ala. 97; *Russell v. Richards*, 10 Me. 429; *Falaenau v. Reliance Steel Foundry Co.*, 74 N.J. Eq. 325; *Ford v. Cobb*, 20 N.Y. 344.

## SECTION 2.

## RECONVERSION OF FIXTURES INTO CHATTELS.

## TYSON v. POST.

108 N.Y. 217. 1888.

APPEALS from orders of the General Term of the Supreme Court in the second judicial department, made May 14, 1885, which reversed judgments in favor of plaintiffs, entered upon decisions of the court on trial at Special Term.

These actions were brought to foreclose two purchase-money mortgages executed by defendant Cooney upon certain premises situate in Queens County.

There was attached to the premises at the time of the sale and conveyance by the mortgagees and the execution of the mortgage the plant and machinery of two marine railways, the use of which had been abandoned. The controversy was as to these fixtures, of which defendant Post claimed to be the owner. The negotiations for the purchase were between plaintiffs and one Carroll, the conveyance was made to Cooney as the nominee of Carroll. Defendant Post claimed that he advanced the money to complete the cash payment required by the contract of purchase under the understanding and oral agreement of all the parties that he should have the title to said plant and machinery and the right to remove them at any time from the premises.

ANDREWS, J. The question whether the defendant Post acquired title to the plant and machinery of the marine railways embraced in the plaintiffs' mortgage, as security for the \$6200 paid by him to the plaintiffs at the request of Carroll, to enable the latter to complete the first payment on the contract with the plaintiffs for the purchase of the land, does not depend upon the character of the property, whether real or personal, when placed upon the mortgaged premises. There can be little doubt, however, that the machinery, shafting, rollers and other articles became, as between vendor and vendee, and mortgagor and mortgagee, fixtures and a part of the realty. *McRae v. Central Nat. B'k*, 66 N.Y. 489. But, as by agreement, for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures (*Ford v. Cobb*, 20 N.Y. 344; *Sisson v. Hibbard*, 75 id. 542), so, also,

it would seem to follow, that by convention the owner of land may reimpress the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity and the reconversion does not interfere with the rights of creditors or third persons. The plant and machinery in question were personal property when placed on the land, and the only issue presented is, Did the plaintiffs agree with Post that he might take the title to the plant and machinery for his security, free of the mortgage, and remove them at any time from the mortgaged premises, thereby reimpressing the property with the character of personalty? In determining this question it does not seem to us to be very material to inquire whether the deed from the plaintiffs to Cooney (the nominee of Carroll), and the mortgage back embraced, or was intended to embrace, the plant and machinery. Post was not a party to the instruments and is not concluded by them. The rights of Post depend wholly upon his agreement with the plaintiffs, and if they received his money upon the agreement that he should have the plant and machinery, with the right to remove them without restriction as to time, the agreement was valid although by parol, and even if it contradicts the legal import of the mortgage, it being an agreement between different parties, it is not within the rule which forbids parol evidence to contradict a written instrument.

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GIBBS v. ESTEY.

15 Gray (Mass.) 587. 1860.

ACTION OF TORT for breaking and entering the plaintiff's close and digging up and carrying away a house. Answer, that the house was the personal property of the defendant Estey.

At the trial in the superior court before ROCKWELL, J., there was evidence that the close was in 1850 owned by Ira Haskell; that he, while in possession of the land, assented to the erection of a house thereon by Warren Gibbs, and agreed that Gibbs should hold the house as personal property; and that this assent was given and agreement made after the cellar had been dug, the cellar wall and underpinning stone laid, the frame of the house erected, and while the work of building was still going on. The judge ruled that such assent and agreement, to be effective, must have been before or at the time when the frame of the house was erected.

The judge rejected evidence, offered by the defendants, of the declarations of Solomon Gibbs, Haskell's grantee and the plaintiff's grantor, while in possession of the land, that he neither owned nor claimed the house.

There was evidence that Estey bought the house of Warren Gibbs as personal property, and afterwards bought the equity of redemption of the land at a sale on execution against Solomon Gibbs; that he subsequently released to Solomon the rights acquired by this purchase, and remarked to him, at the time of delivering the release, that he should abandon his claim to the house, as he had been advised by counsel that he could not hold it. The judge instructed the jury that if, at the time of delivering such release, Estey verbally relinquished his claim to the house, neither he, nor any one claiming under him, could afterwards legally assert any title to it, by virtue of any previous title to it as personal property.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

DEWEY, J. The plaintiff has acquired an undisputed title to the real estate described in his writ by sundry conveyances passing the title of Ira Haskell as he held the same at the date of his deed to Solomon Gibbs. It is conceded that this title of Haskell was originally a valid one, and sufficient to pass the estate in the land, but it is contended that the house standing thereon, and which is the subject of the present controversy, was the personal property of Warren Gibbs, under whom the defendants claim title. The question in the case is therefore whether this house was real estate and passed by the various conveyances as such, or was personal estate capable of being held and sold irrespectively of its connection with the land. If it was a part of the realty, it has duly passed to the plaintiff. The general rule is that a building like a house, erected on the land, will of course become a part of the realty, and as incident thereto will pass with the land. An exception to the rule has been held to exist in cases where the owner of the land has given permission to another person to erect a building upon such land, to be held and enjoyed as his own as personal property. Such separation of the personal from the real estate to which it is attached is to be established by evidence of assent to the erection of the same, before the structure is erected and has become attached to the realty, and thus had its character fixed. That essential element was wanting in the present case. It is shown in this case that the time of giving such assent was after the digging of the cellar, the laying of the cellar wall and underpinning stone, and the erection of the frame of the house thereon, and while the process of further completing the building was going on. The instruction of the court, that such assent, to be effective, must have been given before or at the time when the frame of the house was erected, was correct. After that period of time, the building, though it might be an unfinished building, was a building attached to the real estate, and would pass as such. The intention of the parties, if it existed, to change this to personal property, was one which the law could not carry into effect. *Richardson v. Cope-*

land, 6 Gray, 538. Such being the case, the house would in law pass by the various conveyances of the real estate upon a part of which it stood.

The declarations of Solomon Gibbs, one of the intermediate owners, while he owned the real estate, that the house was not owned or claimed by him, would not defeat the title legally in him, and which he has passed to the plaintiff.

It is unnecessary to consider the further question of the effect to be given to the evidence of the declarations of the defendant Estey, wholly relinquishing his claim to the house at the time of making his quitclaim deed of the land to Solomon Gibbs, the grantor of the plaintiff. In the view the court take of the case, the first ground is decisive in favor of the plaintiff, without any aid from these declarations.

*Judgment for the plaintiff.*

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NORTHERN CENTRAL RY. CO. v. CANTON CO.

30 Md. 347. 1868.

BRENT, J., delivered the opinion of the court.

It appears from the facts in this case, that the Northern Central Railway Company, after the year 1855, and before 1859, constructed, at its sole cost and charge, a railway track upon the lands of the Canton Company, with the license and permission of the latter. The route adopted was agreed upon between them, and at the time of the construction of the road, the appellant had reason to believe it was laying its railroad upon land over which it had the free right of way. Whatever may have been the misunderstanding, as subsequently developed, between the companies, it was then believed by both of them that arrangements could be effected by which a continuous road, resulting in their mutual benefit, would be constructed from some point, in or near Baltimore city, on the main stem of the appellant's road to navigable water. Its construction, however, was prevented by circumstances, which it is unnecessary for the purposes of this case to notice in detail. The appellee, satisfied that the connection would not be made, thought proper in 1859 to revoke the license under which the appellant was in possession of its land. This was followed in 1860 by two suits; one an action of ejectment, and the other of trespass *quare clausum fregit*. During the pendency of these suits, which had been referred by agreement to an arbitrator, the appellant filed a bill for specific performance, and also praying for an injunction. The appellee was successful in having the bill dismissed, and recovered judgment in both actions at law. A subsequent action of ejectment was brought in January,

1865, for the road-bed, which had not been embraced in the previous ejectment suit. A judgment therein was obtained in June following, and under a writ of *habere facias possessionem*, possession was delivered to the appellee in October of the same year. The rails and other materials, which formed a part of the railway constructed by the appellant under the circumstances above stated, were upon the land at the time, and the question arises who is the rightful owner of them?

The fact that they had been taken up and severed from the soil shortly before the execution of the writ of possession is immaterial. If the appellant had no title to them while attached as a railway to the soil, the severance did not confer any.

The general rule of the common law certainly is, that whatever is fixed and annexed to the soil becomes a part of it, and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases in which the question arose, to form an exception. No matter how strongly attached to the soil or firmly imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes v. Maw*, 3 East, 38 (2 Smith's L. C. 251), the earlier and more important decisions upon this subject are very fully reviewed by Lord ELLENBOROUGH, and his conclusion from them, that trade fixtures and buildings for trade have always been recognized as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness v. Pacard*, 2 Peters, 37, the exception is recognized by the Supreme Court of the United States, STORRY, J., delivering the opinion, and the doctrine applied to a house, which had been erected as an accessory to the business of a dairyman, although it was occupied as the residence of his family and those employed by him. It is also recognized and asserted in *Holmes v. Tremper*, 20 John. Rep. 29; *White's Appeal*, 10 Barr. 252, and authorities there cited.

Another exception to the general rule is, that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder; and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty, or is to be treated as personal property. In the notes to the cases

of *Prince v. Case* and *Rerick v. Kern*, 2 Amer. L. C. 747, it is correctly said, "The American courts have repeatedly held that a house or other building will not be merged in the land on which it stands in consequence of the solidity of its structure or the connection between it and its foundations, if the agreement of the parties and the purposes of justice require that the title to both should be kept separate, and that the owner of the house should have the right to enter for the purpose of using it as his own, or removing it." In the case of *Dame v. Dame*, 38 N.H. 429, this doctrine was applied to a house erected upon the land of another, and it was held to be but a personal chattel. It is also established by *Curtiss v. Hoyt*, 19 Conn. 165; *Wells v. Banister*, 4 Mass. 514; *Barnes v. Barnes*, 6 Vermont, 388; *Pemberton v. King*, 2 Devereux, 376; and being personalty, it is governed by the same rules as any other personal property left by the consent of the owner of the land upon his premises. *Smith v. Benson*, 1 Hill, 176.

We consider the property in dispute in this case, as coming within both of these exceptions. The railway, of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary business and pursuits of a railway company. It certainly was not accessory to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned, it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade, in which the corporators, under their corporate powers, had embarked as carriers. A railway is certainly quite as essential to the trade and business of a railway company, as a steam engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in the *Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barbour, 484, and cited with approval in 18 Md. 193, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet when it is accessory to trade, and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

All the surrounding circumstances shew that at the time this railway was laid upon the land of the appellee, it was not intended that



it should be merged in the freehold. It was built at the sole cost of the appellant, with its money and labor, under the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management, and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

The strict rule which has been applied to tenants, requiring them to remove fixtures, which they hold as personal property during the term, even if it were adopted by this court, does not apply to the present case. The ground upon which a tenant's right to remove his fixtures has been limited during the continuance of his term, rests upon the doctrine that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term, being uncertain in its continuance, may be terminated suddenly and without previous notice. To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another.

If the property replevied did not belong to the appellee at the time the license to the appellant to be upon its land was revoked, it is not perceived how the subsequent suits between them could have changed the title to it. This property was not the subject of those suits. They had reference to the land only upon which it was, and determined no question of its ownership, inasmuch as it does not pass with the realty from the single circumstance of having been affixed to the soil.

Upon a careful review of the law and facts in this case, we cannot agree with the court below. We think the property in question belonged to the appellant, and that the judgment below should be reversed.

*Judgment reversed, and judgment for the  
appellant for the property replevied,  
and one cent damages and costs.*

NOTE. — In *Matter of City of New York*, 192 N.Y. 295, the court

said (p. 302): "The familiar limitation upon the right to remove such fixtures is that the removal must be accomplished without substantial injury to the freehold. The further condition has not been adopted so far as we are aware in the broad language used in this proceeding, that the property must be susceptible of removal 'without injury to said property.' Many additions held to be trade fixtures and removable were necessarily more or less injured in process of removal."

The same liberality prevails in favor of the tenant with respect to "domestic fixtures." *Raymond v. Strickland*, 124 Ga. 504; *Hayford v. Wentworth*, 97 Me. 347.

In *Elwes v. Maw*, 3 East 38, the court held that a tenant who had erected certain structures for agricultural purposes could not remove them even during his term. It has often been queried if such a distinction should be taken in America. See the remarks of Mr. Justice STORY in *Van Ness v. Pacard*, 2 (Pet.) U.S. 137, 144. And probably *Elwes v. Maw* would not be followed. See *Harkness v. Sears*, 26 Ala. 493; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Holmes v. Tremper*, 20 Johns. (N.Y.) 29; *Wing v. Gray*, 36 Vt. 261. But cf. *M'Cullough v. Irvine's Executors*, 13 Pa. 438.

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### SQUIRE & CO. v. PORTLAND.

106 Me. 234. 1909.

CORNISH, J. This is an appeal from the decision of the assessors of the city of Portland refusing to abate a tax levied upon the appellant for the year 1908. Under the agreed statement of facts two questions are involved, first, whether the appellant can maintain this appeal not having furnished to the assessors a list of its taxable property. Second, whether the property in question was taxable to the appellant on April 1, 1908, as personal property. . . .

Was the property in question legally taxable to the appellant on April 1, 1908? In the opinion of the court it was not. This property which was assessed as personal property is called a refrigerator; but from the description given it really consisted of several cold-storage rooms forming a part of a leased building. If taxable at all to the appellant it must be on the ground that it was a trade fixture, removable by the tenant during the lease and therefore owned by it during that time as personal property. From the agreed statement it appears that the appellant has occupied a store in Portland since 1901 under a written lease, the terms or conditions of which, however, are not given; that a refrigerator or receptacle for the storage of meats and provisions has been constructed by the appellant during its occupancy; that "said refrigerator is constructed of

wood and occupies the whole width of the building aforesaid at one end from wall to wall, a distance of about twenty-three feet and is in length about thirty feet. It occupies the basement and the five floors immediately above the same and is constructed by sheathing the interior walls of the building with wood, and packing between this wood and said interior walls shavings to the thickness of some six or eight inches. A double wall of wood similarly packed with shavings constitutes the front of the refrigerator, extending from side wall to side wall, and extends from the basement to the roof of the building, six stories in all. The basement of the refrigerator is separated from the story immediately above, as is that story from the next succeeding story, and so on, up to and including the third story above the basement, by a double wooden floor, filled with wood shavings, of some eighteen inches in thickness, which floors replace the original floors of the building which were torn out by the petitioner with the consent of the lessor in the construction of the refrigerator. It is admitted that said refrigerator could be removed from the said premises only after having been taken to pieces."

Did this constitute a trade fixture or was it a part of the real estate at the time of the assessment?

There is authority for holding that even granting this to be a trade fixture, it became a part of the realty when annexed and remained so until actually severed. Ewell on Fixtures, 2nd ed. page 122, states the doctrine in this language: "The nature of this right of removal has been explained in two ways: by supposing that the chattel nature of the thing is preserved after its annexation, or by considering that the thing ceases to be a chattel by being affixed to the land, and becomes real property, but reducible again to a chattel state by separation from the realty. There is some confusion and looseness of expression among the authorities on this subject, occasioned probably by the fact that in some relations and for some purposes, as in favor of execution creditors, or the executors of a tenant, the chattel nature of the thing is not lost by its annexation. For many, if not most purposes, however, during the continuance of the annexation, the thing is treated as a parcel of the realty; and though it is in the power of the party making the annexation to reduce the thing again to the state of goods and chattels by severance, yet until so severed, it remains a part of the realty; and this seems to apply as well to trade fixtures as to other fixtures." See also *Preston v. Briggs*, 16 Vt. 124; *Bliss v. Whitney*, 9 Allen, 114; *Stockwell v. Marks*, 17 Maine, 455; *Davis v. Buffum*, 51 Maine, 160; *Sawyer v. Long*, 86 Maine, 541. Under these authorities, the assessment being laid while the annexation continued, it was invalid.

But the property in the case at bar never constituted a fixture. It is undoubtedly true that the rules of law defining fixtures have grown less rigid in later years and especially is this true of trade fix-

tures as between lessor and lessee. It is also true that as to such fixtures the intention of the party making the annexation is given special prominence in applying the rule and that the burden of showing the existence of the requisites for a merger is upon the party claiming such merger. *Hayford v. Wentworth*, 97 Maine, 347. The three requisites specified in the case last cited are physical annexation, adaptability or usability, and intention. The first two of these requirements are fully met in the case at bar, as the description before given clearly shows. As to the third, the intention of the lessee, that must be proved not by the unrevealed and secret intention of the party, which would be well nigh impossible, but by the facts and circumstances including the relations and the conduct. It is more a matter of inference than of declaration. Were it a question of intention as expressed subsequently, the attitude of the appellant in this suit, resisting the claim of a fixture and insisting upon the merger, would have great force, because it would be extremely difficult for the lessee to hereafter sustain such a claim in view of the position taken here. But the alterations made in this building by the lessee do not possess the elements of a trade fixture. "Trade fixtures" is a term usually used to describe property which a tenant has placed on rented real estate to advance the business for which the realty is leased and may as against the lessor and those claiming under him, be removed at the end of the tenant's term. *Words & Phrases*, vol. 8, page 7042; *Ewell on Fixtures*, page 129. This definition embraces a large variety of additions and erections, of which the books are full, as the temporary partition in *Hanson v. News Pub. Co.*, 97 Maine, 99; a wash down, syphon water closet in *Hayford v. Wentworth*, 97 Maine, 347; an ice chest, consisting of a large and heavy wooden box lined with zinc, in *Park v. Baker*, 7 Allen, 78; bowling alleys nailed to the floor, in *Hanrahan v. O'Reilly*, 102 Mass. 201; boilers, engines, shafting, etc., removable without material injury to the building, in *Bergh v. Herring-Hall-Marvin Co.*, 136 Fed. 368; bakers ovens and boilers, in *Baker v. McClurg*, 198 Ill. 28, 64 N.E. 701 temporary sheathing, partitions and a cold-storage box, attached by strips and nails to the wall and floor, in *Ward v. Earl*, 86 Ill. App. 635. But all these cases differ from the case at bar in two essential particulars; first, they involved addition and not substitution, and second, the fixtures could be removed without substantial injury to the realty.

It is a well-recognized principle that trade fixtures which are in substitution for essential parts of the leased premises and not additions thereto are not removable, but are presumed to be permanent additions. *Cyc.* 1066; *Ewell on Fixtures*, page 146, note. This is but another way of stating that this fact when proved has great and possibly controlling weight upon the question of intention. In *Felcher v. McMillan*, 103 Mich. 494, 61 N.W. 791, the tenant removed the

pillars, the partitions, sewers and floors in the building occupied by him replacing them by others, more expensive but better suited to his business; held that the latter became a part of the realty and could not be removed as trade fixtures. The court say: "The lessees chose to remove the pillars, the partitions, the sewers, the cement floor, and to replace them by others which they considered better suited to their business. If they chose to replace wooden pillars with iron ones, plate-glass fronts and partitions with refrigerators and mirrors solidly built in the partition walls, and to take up the sewers and floors, and replace them with others better and more expensive, the new ones do not thereby become trade fixtures, subject to removal by the tenant. The law does not permit tenants to remove fixtures which are built into the building and become a part of it." In *Bovet v. Holzgraft*, 5 Texas, Civ. App. 141, 23 S.W. 1014, a new stairway was substituted for an old one. Held that the former became a part of the realty and irremovable by the tenant. See also *Ashby v. Ashby*, 59 N.J. Eq. 536, 46 Atl. 528.

The tenant in the case at bar tore out the original floors in the rear thirty feet of the building and replaced them with double wooden floors eighteen inches thick filled with wood shavings. When completed the new floor simply took the place of the old and became a part of the building. They could no more be removed by the tenant than the original.

Another principle equally well settled is that the right of removal can only be exercised when it causes no material injury to the estate. The value of this principle also is its bearing upon the question of intention. But it is a rule universally recognized and nowhere more carefully than in the cases first cited where the right of removal was granted, it being proved that no substantial injury would ensue. In *Collamore v. Gillis*, 149 Mass. 578, a baker's oven, built of bricks and mortar, and so united with the building that the two were inseparable without the destruction of the oven and a substantial injury to the building, was held not to be a removable trade fixture.

"Where the chattel is so annexed that it cannot be removed without material injury to the realty it would ordinarily be a necessary inference that the intention was not to remove it," says this court in *Hayford v. Wentworth*, 97 Maine, at page 350, *supra*. That necessary inference must be drawn here. The appellant did not place any fixture in the building that it intended to remove. A part of the structure itself was changed and remodelled. It was for the most part a case not of construction but of reconstruction, not of addition but of substitution. Floors were removed and thicker floors were substituted. The walls were doubled with a thickness of six inches of shavings between, and a similar double wall was constructed to separate these several rooms from the rest of the building. To remove all this would be to leave the building with thirty feet in the rear

without floors and open from basement to roof. And after removing what was put in, the tenant would have not a structure or machine the parts of which could fit into one another and be reassembled and set up in some other place, but a worthless mass of old lumber, hardware and shavings. The burden of proof as to merger is fully sustained here, by the character of the changes made, by the fact of substitution, by the material injury to the building consequent upon removal, and by the valueless condition of the so-called fixture when removed. The inference is irresistible that the property became a part of the building itself and that the appellant is correct in its contention that it had no ownership therein.

Appeal sustained with costs and case remanded to the court at nisi prius for the determination of the question of over-valuation in accordance with the stipulation of the parties.

*So ordered.*

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PHELPS v. AYERS.

142 Wis. 442. 1910.

SIEBECKER, J. The court's findings of facts, supplemented by the undisputed evidence, show that the plaintiffs and the lessee of the defendant occupied the defendant's premises under a lease to conduct the business of storing and selling ice which was harvested from the millpond on the premises during the term of the lease, and for this purpose constructed the icehouse in question. It appears that the plaintiffs and the lessee, McGovern, arranged to engage in this enterprise before the execution of the lease; that the plaintiffs, pursuant thereto, undertook to furnish the lumber needed for erecting the icehouse and to defray the cost of its construction; and that it was understood between them that the title to the lumber was to remain in these plaintiffs. The facts and the accompanying circumstances of the transactions between the lessee, McGovern, and the defendant, as owner of the premises, warrant the implication that it was understood at the time of the making of the lease that these parties intended that the icehouse and the lumber therein might be removed from the premises by the lessee and the plaintiffs. No time was, however, specified in the agreement of the parties within which such removal was to be made. Under these circumstances the law limits the time for the exercise of this right to the period covered by the lease or the period after its expiration during which the lessee remains in possession of the premises, if the structure is of a nature which makes it an accession to the real estate and thus a fixture. See the following cases: *Keogh v. Daniell*, 12 Wis. 163; *Fitzgerald v. Anderson*, 81 Wis. 341, 51 N.W. 554. There is no uncertainty in the

law that if a lessee surrenders possession of the premises before removal of a fixture, without an express reservation of the right of removal, he loses all right to remove it. *Josslyn v. McCabe*, 46 Wis. 591, 1 N.W. 174; *Hart v. Hart*, 117 Wis. 639, 94 N.W. 890; *Second Nat. Bank v. O. E. Merrill Co.*, 69 Wis. 501, 34 N.W. 514.

The appellants aver, however, that their right and title to the lumber in the icehouse is founded on the fact that the structure and the material composing it never became an accession to the real estate on which it was erected and that it is now personal property, and hence that the title thereto did not pass to the defendant, as owner of the real estate, at the expiration of the McGovern lease. This claim raises the inquiry whether or not the lumber in the icehouse has changed its status from that of personalty to realty. This status is determined by the accompanying facts. The evidence does not show that the parties to the lease mutually intended that this material should remain personalty. Hence we have a mental attitude of one party opposed to that of the other respecting this question, and we must therefore resort to the external and visible facts and accompanying circumstances to determine the controversy. This involves the inquiry as to whether or not the structure was actually annexed and appurtenant to the land, the inquiry as to whether or not it was appropriate to the use of the realty on which it was placed, and an inquiry into the structure of the building, its mode of annexation, and the relation and situation of the parties to the transaction. The evidence shows that the building was located and attached to the ground as icehouses usually are built, which is by resting the superstructure on wooden sills or planks, by erecting thereon the framework, and inclosing it with boards on the sides and a shingled roof. All of the parts were properly united to make a substantial and completed structure for storing ice. As thus constructed it was appropriate for storing ice on the premises on which it was located, which appear to have been conveniently located as to proximity and accessibility to the millpond from which the ice was harvested. All of these are persuasive facts to show that the icehouse was in its nature and purpose adapted to the use of the real estate to which it was attached, and in their probative force clearly rebut any contrary inferences arising from the situation and relation of the parties. While it may be inferred from the situation that this enterprise was of a temporary nature and was to continue only for the one season covered by the written lease, this is not necessarily incompatible with the idea that this structure has characteristics of permanency, and, under the accompanying circumstances, became an accession to the realty. We are persuaded that the structure is a permanent accession to the realty and that the lumber composing it did not retain its former status of personalty.

It is urged that this conclusion operates to transfer to the defend-

ant a large amount of property without any consideration. Such is not the legal implication of the case. Since the plaintiffs did not remove the structure while in possession of the premises under the lease, and did not by agreement with the defendant reserve a right to remove it thereafter, the law implies that in consideration of securing the lease of the premises and its use and occupation they were compensated for the expense of its erection, and that these considerations operated to compensate them for the cost of adding this fixture to the defendant's land. From any viewpoint of the conduct of the parties, the consequences of the situation which vests the right to this structure in the defendant are attributable to the voluntary acts of the plaintiffs in omitting to seasonably remove the building during the lessee's tenancy and in their failure to reserve the right to remove it thereafter. Under these circumstances the law is unable to afford them relief if they sustained pecuniary losses through such omissions.

*By the Court.* — Judgment affirmed.

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*Ex parte* BROOK.

L. R. 10 Ch. D. 100. 1878.

A TRUSTEE in bankruptcy of a lessee sold and severed trade fixtures upon the leased premises, and thereafter disclaimed the lease. By statute, such disclaimer had the effect of a surrender of the lease on the date of the trustee's appointment. The landlord sought to recover the proceeds of the sale from the trustee.

THESIGER, L.J. The general presumption of law with reference to tenants' fixtures remaining affixed to the freehold when a term comes to an end is, that "they become a gift in law to him in reversion," and are, therefore, not removable (per Lord HOLT in *Poole's Case*, 1 Salk. 368). That general presumption has, however, been made subject to a qualification which is expressed in the proposition laid down by the Court of Exchequer in *Weeton v. Woodcock*, 7 M. & W. 14, 19, in these terms — viz., "that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant," or, in the language of Baron PARKE in *Mackintosh v. Trotter*, 3 M. & W. 184, "that the tenant has the right to remove fixtures of this nature during his term, or during what may for this purpose be considered as an excrescence on the term." Much reliance has been placed in argument on the part of the respondent upon this qualification of the general presumption of law, and it has been urged upon us that in this case the period between the appointment of the trustee and the disclaimer was such an



"excrescence" on the term, and that the respondent had during that period a right to consider himself as tenant. We cannot accede to that argument. It is not easy to define precisely what was meant by the propositions to which we have just referred, and we observe, that as regards the rule laid down in *Weeton v. Woodcock*, the difficulty which we feel in understanding its exact meaning was shared in by the Court of Common Pleas, as stated by Mr. Justice WILLES in delivering the judgment of that court in *Leader v. Homewood*, 5 C. B. (N.S.) 546, 553. It may be that in cases where a tenant holds over after the expiration of a term certain under a reasonable supposition of consent on the part of his landlord, or in the case where an interest of uncertain duration comes suddenly to an end, and the tenant keeps possession for such reasonable time only as would enable him to sever his fixtures and to remove them with his goods and chattels off the demised premises, or even in cases where the landlord exercises a right of forfeiture, and the tenant remains on the premises for such reasonable time as last referred to, the law would presume a right to remove tenant's fixtures after the expiration or determination of the tenancy. But, however that may be, we are clearly of opinion that the case of a surrender of a lease by a tenant, while tenant's fixtures remain affixed to the freehold, does not, either upon principle or the authority of decided cases, give any right to the tenant subsequently to remove such fixtures. At the date of the surrender they form part of the freehold, and the law has no right to limit the effect of the surrender by excluding from it that which legally passes by it, and which has not been excluded from it by the bargain of the parties.

Order of the County Court Judge [for the landlord] restored.

NOTE. — In *Lewis v. Ocean Navigation Co.*, 125 N.Y. 341, a tenant who held over beyond his term was held to be entitled to remove fixtures placed by him on the land, after the expiration of his term. PECKHAM, J., said (p. 351), that the fixtures must be removed "during the time of possession, but not in all cases during the running of the term." Cf. *Cromie v. Hoover*, 40 Ind. 49.

A tenant at will has a reasonable time after the tenancy is determined to remove fixtures. *Ellis v. Paige*, 1 Pick. (Mass.) 43. But not if he has received such notice to quit as was required by statute, and has failed to remove the fixtures before the date when he should have quitted the premises. *Erickson v. Jones*, 37 Minn. 459.

A tenant of a mortgagor does not lose his right to sever fixtures through a foreclosure of the mortgage. *Sanders v. Davis*, L.R. 15 Q.B.D. 218.

In *Morey v. Hoyt*, 62 Conn. 542, the court said (p. 546): "Another general rule quite well established is this: Where the term is surrendered, or is put an end to by the lessor under a forfeiture clause for

some act or omission of the tenant, and he is put out of and the lessor is put into possession, the right of the tenant to remove his fixtures, in the absence of special agreement or special circumstances affecting his right to remove, is gone as effectually as if the term had expired by lapse of time." Cf. *Gasaway v. Thomas*, 56 Wash. 77; *Gartland v. Hickman*, 56 W. Va. 75.

In *Lawton v. Lawton*, 3 Atk. 13, the court held that a fire engine set up for the benefit of a colliery by a tenant for life was part of the assets of his executor. But cf. *White v. Arndt*, 1 Wh. (Pa.) 91.

In *Thropp's Appeal*, 70 Pa. 395, a creditor of the tenant levied execution on fixtures erected by the tenant. Thereafter the tenant, for a consideration, surrendered the term to the landlord who had no knowledge of the levy. It was held that the purchaser at the execution sale could not remove the fixtures. In *London Discount Co. v. Drake*, 6 C. B. N.S. 798, the tenant mortgaged his fixtures and then made a gratuitous surrender of the term to the landlord. It was held that the mortgagee had a right to enter and sever the fixtures.

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### WATRISS v. FIRST NATIONAL BANK.

124 Mass. 571. 1878.

CONTRACT for breach of a covenant contained in a written lease given by the plaintiff to the defendant, by which the lessee agreed "to quit and deliver up the premises to the lessor or her attorney peaceably and quietly at the end of the term, in as good order and condition . . . as the same now are." The breach complained of was the taking down and removal of a fire-proof safe and vault, a furnace with pipes and flues, and certain counters. The answer contained a general denial, and alleged that the defendant owned the property removed. Trial in this court, before AMES, J., who reported the case for the consideration of the full court, in substance as follows:

The plaintiff and one Hyde owned the premises as tenants in common, and by a lease dated January 1, 1861, demised them to the Harvard Bank for the term of ten years, at the rent of \$300 a year. The lease contained a clause giving to the lessee the privilege, at its option, of renewing and extending its enjoyment of the premises for the additional term of five years upon the same terms; and the lessee agreed "to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term, in as good order and condition, reasonable use and wearing thereof, fire and other unavoidable casualties excepted, as the same now are or may be put into by the said lessors," "and not make or suffer any waste thereof;" "nor make or suffer to be made any alteration therein, but with the approbation of the lessors thereto in writing having been

first obtained;" and giving the lessors the right to enter to view and make improvements, and expel the lessee if it should fail to pay the rent as aforesaid, or to make or suffer any strip or waste thereof.

The lessee thereupon constructed in the building a fire-proof safe or vault, for the safe keeping of money, books and securities, also a portable furnace in the basement, with the necessary pipes, flues and registers for warming its rooms, and certain counters. The premises were occupied by the lessee as its banking rooms.

On May 16, 1864, the lessee was organized as a national bank under the laws of the United States, and its name was changed to the First National Bank of Cambridge, but there was no other change of its identity. In the course of the first term, a partition was duly had between Hyde and the plaintiff, by virtue of which the plaintiff became the sole owner of the premises. Before the expiration of the term, the defendant elected to continue to hold under the lease for the five additional years, and a new lease was executed between the parties to this action, bearing date October 7, 1870, granting to the defendant a further term of five years from January 1, 1871, at the rent of \$800 a year. This lease contained the same clauses above quoted from the lease of January 1, 1861, and the following additional clause: "And provided also, that in case the premises, or any part thereof, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportional part thereof, according to the nature and extent of the injuries sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended, at the election of the said lessor or her legal representatives."

On or about November 5, 1875, the defendant, having concluded to remove its business to another building, proceeded to take down the vault, and remove the materials of which it was composed, and also the furnace, pipes, flues, registers and counters to its new banking rooms, contending that it had a right so to do.

It was agreed that the damage done by this proceeding to the building, if the property so removed could lawfully be considered as fixtures which the defendant, as an outgoing tenant, had a right to remove, was \$75; that the plaintiff was entitled, at all events, to recover that sum, with interest, and that the building could for that sum be restored to the same good order and condition as it was in at the date of the first lease. The jury returned a verdict for the plaintiff for \$75, and the judge reported the case for the consideration of the full court. If the plaintiff was entitled to recover a greater sum than the amount of the verdict, and if the alleged fixtures were removed wrongfully and in violation of her rights, the case was

to stand for trial; otherwise, judgment was to be entered on the verdict.

ENDICOTT, J. It is stated in the report that the Harvard Bank, soon after taking possession of the premises under the lease of January 1, 1861, put in a counter, a portable furnace with its necessary connections, and a fire-proof safe or vault, for the removal of which, in 1875, this action is brought. In 1864, the Harvard Bank was organized as the First National Bank of Cambridge. No question is made that all the proceedings were according to law. The right to the personal property of the old bank passed therefore to the defendant upon the execution of the necessary papers and the approval of the proper officers; no other assignment was necessary. *Atlantic National Bank v. Harris*, 118 Mass. 147, 151.

The right of the defendant to occupy the premises under the lease to the Harvard Bank for five years, and to exercise the option contained in the lease to hold the premises for five years more at the same rent, seems to have been conceded by the lessors; for the defendant continued in possession, paying rent during the whole term of ten years contemplated by the lease, which expired January 1, 1871. We must assume that the title, not merely to movable chattels upon the premises, but also to trade fixtures put in by the Harvard Bank, passed to the defendant, as the plaintiff does not deny that the defendant could have removed such of the articles as are trade fixtures at any time before the final expiration of the lease on January 1, 1871.

In October, 1870, about three months before the final expiration of the term of the old lease, the plaintiff, one of the original lessors, who had in the mean time acquired the whole title to the premises, executed a new lease to the defendant, then in occupation, for a much higher rent, containing different stipulations from those in the old lease, particularly in regard to abatement of rent in case of fire. This lease was to take effect January 1, 1871, but made no reference to the existing lease or to the removal of any trade fixtures then upon the premises. It was in no proper sense a renewal of the old lease. It contained the usual covenants on the part of the lessee to quit and deliver up the premises at the end of the term in as good order and condition "as the same now are." Although executed before the expiration of the earlier lease, it can have no other or different effect than if given on the day it was to become operative, and its stipulations and conditions are to be considered as if made on that day. And the question arises whether the acceptance of the new lease and occupation under it on January 1, 1871, was equivalent to a surrender of the premises to the lessor at the expiration of the first term. If it did amount to a surrender, it is very clear that the defendant could not afterwards recover the articles alleged to be trade fixtures.

The general rule is well settled that trade fixtures become annexed to the real estate; but the tenant may remove them during his term, and, if he fails to do so, he cannot afterwards claim them against the owner of the land. *Poole's Case*, 1 Salk. 368; *Gaffield v. Hapgood*, 17 Pick. 192; *Winslow v. Merchants Ins. Co.*, 4 Met. 306, 311; *Shepard v. Spaulding*, 4 Met. 416; *Bliss v. Whitney*, 9 Allen, 114, 115, and cases cited; *Talbot v. Whipple*, 14 Allen, 177; *Lyde v. Russell*, 1 B. & Ad. 394. Baron PARKE, in *Minshall v. Lloyd*, 2 M. & W. 450. This rule always applies when the term is of certain duration, as under a lease for a term of years, which contains no special provisions in regard to fixtures. But where the term is uncertain, or depends upon a contingency, as where a party is in as tenant for life, or at will, fixtures may be removed within a reasonable time after the tenancy is determined. *Ellis v. Paige*, 1 Pick. 43, 49; *Doty v. Gorham*, 5 Pick. 487, 490; *Martin v. Roe*, 7 E. & B. 237. See also *Whiting v. Brastow*, 4 Pick. 310, 311, and note.

There is another class of cases which forms an exception to the general rule. Where a lease was given by an agent without sufficient authority during the absence of the owner, and was terminated by the owner on his return from abroad, it was decided by this court that the lessees became tenants at sufferance, and could remove their fixtures within a reasonable time after such termination. *Antoni v. Belknap*, 102 Mass. 193. In *Penton v. Robart*, 2 East, 88, it was held that a tenant, who had remained in possession after the expiration of the term, had the right to take away his fixtures, and Lord KENYON said, "He was in fact still in possession of the premises at the time the things were taken away, and therefore there is no pretence to say that he had abandoned his right to them." In *Weeton v. Woodcock*, 7 M. & W. 14, a term under a lease had been forfeited by the bankruptcy of the lessee, and the lessor entered upon the assignees to enforce the forfeiture, and it was held that they might have a reasonable time to remove fixtures; and Baron ALDERSON said that "the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant." Mr. Justice WILLES, commenting on these two last cases, in *Leader v. Homewood*, 5 C. B. (N.S.) 546, said: "It is perhaps not easy to understand fully what is the exact meaning of this rule, and whether or not it justifies a tenant who has remained in possession after the end of his term, and so become a tenant at sufferance, in severing the fixtures during the time he continues in possession as such tenant. But the rule, whatever its exact meaning may be, is plainly inconsistent with the argument relied on by the counsel for the plaintiff in the present case, viz., that the right of the tenant continues till he has evinced an intention to abandon his right to the fixtures." In *Mackintosh v. Trotter*, 3 M. & W. 184, Baron PARKER,

after stating that whatever is planted in the soil belongs to the soil, remarked "that the tenant has the right to remove fixtures of this nature during his term, or during what may, for this purpose, be considered as an excrescence on the term." He also refers to *Minshall v. Lloyd*, 2 M. & W. 450, as authority, wherein he stated in the most emphatic manner that "the right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." It is clear from these cases that the right of a tenant, in possession after the end of his term, to remove fixtures within a reasonable time, does not rest merely on the fact that he is in occupation, or has not evinced an intention to abandon, but because he is still, in contemplation of law, in occupation as tenant under the original lease, and, as Baron PARKE says, under what may be considered an excrescence on the term, that is, as tenant at sufferance.

But a very different question is presented when the same tenant continues in possession under a new lease containing different terms and conditions, making no reference to the old lease, reserving no rights to the lessee in fixtures annexed during the previous term and not removed before its expiration, and containing the covenant to deliver up the premises at the end of the term in the same condition. This is not the extension of or holding over under an existing lease; it is the creation of a new tenancy. And it follows that whatever was a part of the freehold when the lessee accepted and began his occupation under the new lease must be delivered up at the end of the term, and cannot be severed on the ground that it was put in, as a trade fixture, under a previous lease which has expired. The failure of the lessee to exercise his right to remove during the former term, or to reserve it in his new contract, precludes him from denying the title of his landlord to the estate and the fixtures annexed which have become part of it. The occupation under the new lease is in effect a surrender of the premises to the landlord under the old.

This view is supported by the authorities. The earliest case on the subject is *Fitzherbert v. Shaw*, 1 H. Bl. 258. A purchaser of lands having brought ejectment against a tenant from year to year, the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution for a given period; and it was held that the tenant could not, during the interval, remove the fixtures erected during the term and before action brought — on the ground that the tenant could do no act to alter the premises in the mean time, but they must be delivered up in the same situation they were in when the agreement was made and the judgment signed. This case was followed in *Heap v. Barton*, 12 C. B. 274, where there was a similar agreement, and JERVIS, C.J., said that, "if the tenants meant to avail themselves of their continuance in possession to remove the fixtures, they should have said so." In *Thresher v. East*

*London Waterworks*, 2 B. & C. 608, it was held that a lessee, who had erected fixtures for purposes of trade on the premises, and afterward took a new lease to commence at the expiration of the former one, which contained a covenant to repair, would be bound to repair the fixtures, unless strong circumstances were shown that they were not intended to pass under the general words of the second demise; and a doubt was expressed whether any circumstances, *dehors* the deed, can be alleged to show they were not intended to pass. The case of *Shepard v. Spaulding*, 4 Met. 416, touches the question. A lessee erected a building on the demised premises, which he had a right to remove, but surrendered his interest to the lessor without reservation; afterward he took another lease of the premises from the same lessor, but it was held that his right to remove did not revive. When the new lease was made, it was of the whole estate, including the building. This differs from the case at bar only in the fact that there was an interval between the surrender of the interest under the first lease and the granting of the second, when the lessor was in actual possession. But the acceptance of the new lease and occupation under it are equivalent to a surrender of the premises at the end of the term. In *Loughran v. Ross*, 45 N.Y. 792, it was held that, if a tenant, having a right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises, including the buildings, without reservation or mention of any claim to the buildings, and enters upon a new term thereunder, the right to removal is lost, notwithstanding his occupation has been continuous. See also *Abell v. Williams*, 3 Daly, 17; *Merritt v. Judd*, 14 Cal. 59; *Jungerman v. Bovee*, 19 Cal. 354; *Elwes v. Maw*, 3 East, 38; Taylor on Landlord & Tenant (5th ed.), § 552; 2 Smith's Lead. Cas. (7th Am. ed.) 228, 245, 257.

We are therefore of opinion that the defendant had no right during the second term to remove any trade fixtures placed there during the first. If any of the articles named were movable chattels, as the defendant contends, the plaintiff cannot recover for them; but if they were permanent or trade fixtures, the plaintiff may recover for their removal.

*Case to stand for trial.*

NOTE. — See, accord, *Wadman v. Burke*, 147 Cal. 351; *Sanitary District v. Cook*, 169 Ill. 184; *Hedderich v. Smith*, 103 Ind. 203; *Bauernschmidt Co. v. McColgan*, 89 Md. 135; *St. Louis v. Nelson*, 108 Mo. App. 210; *Loughran v. Ross*, 45 N.Y. 792; *Spencer v. Commercial Co.*, 30 Wash. 520.

## RADEY v. McCURDY.

209 Pa. 308. 1904.

## OPINION BY MR. JUSTICE BROWN.

This was a bill by a landlord to restrain his tenants from removing trade fixtures from the demised premises. A preliminary injunction was awarded, but subsequently dissolved. Before final hearing all the articles were removed by the tenants, and the court's decree was that they pay their landlord \$5400, the value of the articles removed, together with the costs of suit.

On September 17, 1892, the appellee leased the premises described in the bill to John C. McCurdy and James McCurdy, trading as McCurdy Brothers, for the term of ten years from October 1, 1892. The court found that the articles enumerated in the bill were trade fixtures and belonged to the lessees under the lease of September 17, 1892. The legal conclusion of the learned judge, that the tenants had the right to remove them during the term of their lease, was, therefore, manifestly correct, and under the facts found, the landlord could have raised no question if they had been removed at any time prior to October 1, 1902. Before the expiration of the lease, the tenants, as required by it, gave three months' notice to the landlord of their intention to terminate it.

In 1899 John C. McCurdy, as found by the court below, "sold his interest in the stock of goods, wares and merchandise, together with the machinery and fixtures, contained in the building at the north-west corner of Front street and Susquehanna avenue, to James McCurdy." On July 11, 1902, a new lease was executed by the appellee to the said James McCurdy and Samuel McCurdy, another brother, trading under the same firm name of McCurdy Brothers, and James and Samuel became the lessees under the agreement of that date, which defines the lease to be an "extended and renewed" lease of September 17, 1892, at a reduced rental. The appellants removed all the fixtures before October 1, 1903, the date of the expiration of the extended and renewed lease.

Under the foregoing facts, the court below made the decree mentioned for the reason that, even if the lease of July 11, 1902, is to be treated as a renewal of the lease of 1892, between the same parties, the appellants had no right to remove the fixtures after the expiration of the first lease, in the absence of a clause in the second one reserving the right to do so at its expiration. Though the lessees under the first lease had an unquestioned right to remove the fixtures at any time before October 1, 1902, and, if they had done so, could immediately after that date have reinstalled them in the premises with the same unquestioned right to remove them at any time before October 1, 1903, the view of the learned court below is that they became the



property of the landlord, because they were not removed and reinstalled, and there is no clause in the "extended and renewed" lease reserving the right of the tenants to remove them before it expired. Though this has been declared to be the law by some courts, and the learned judge had authority outside of this state to sustain him, we cannot subscribe to such a doctrine as being either in harmony with reason or consistent with fair dealing between man and man.

When a tenant attaches to the land fixtures necessary for him in the conduct of his business, the presumption is that, at the expiration of his lease, he will remove them; and it is his right to do so. They are not put in for the benefit of the landlord, and, until the tenant, after his term expires, leaves them on the premises in which he no longer has any interest, no intention can be imputed to him to abandon them to his lessor. *Hill v. Sewald*, 53 Pa. 271; *Watts v. Lehman*, 107 Pa. 106. There is a distinct finding that McCurdy Brothers, the lessees under the lease of 1892, never intended to abandon their trade fixtures. One of the brothers, owning and having them in his possession, on July 11, 1902, entered with another brother into the "extended and renewed" lease. The possession of the premises and the fixtures remained unbroken from 1892 to 1903 in at least one of the present appellants; and yet, because he did not, on the last day of September, 1902, remove them and put them back on the following day, when the "extended and renewed" lease began, and the lessees under it failed to formally reserve the right to remove them at the expiration of the "extended and renewed" term, an intention is to be imputed of an abandonment of them to the landlord. Abandonment to him being a question of intention, it cannot be that, under the undisputed facts in this case, the appellants ever intended to or did abandon their trade fixtures. To have removed them one day and put them back the next would have been a vain and useless thing, which the law requires of no one; and it offends reason to say that the landlord had a right to regard his tenants' property as abandoned to him because one of them, who was to continue as such for another year, needing the same fixtures in his unchanged business into which he had taken another person, had not, when the lease was extended and renewed, inserted a clause giving the tenants the right to remove the fixtures at the end of the extended term. It will profit nothing to review the very many cases brought to our attention by the learned counsel for the appellee to support the decree of the court below. It is sufficient to say that none of our own do so. They are rather in accord with the view which we entertain, that the plaintiff's bill should have been dismissed.

"That a tenant who erects fixtures for the benefit of his trade or business may remove them from the demised premises, is an established doctrine of the law, but with this qualification — that the removal be made during the term. After the term they become

inseparable from the freehold and can neither be removed by the tenant nor recovered by him as personal chattels by an action of trover, or for goods sold and delivered. *White v. Arndt*, 1 Wh. 94, and the cases cited in the argument. If a tenant remain in possession after the expiration of his term, and perform all the conditions of the lease, it amounts to a renewal of the lease from year to year, and I take it he would be entitled to remove fixtures during the year." *Davis v. Moss*, 38 Pa. 346. "It is a well-settled rule of law, that a tenant for years who erects fixtures for the benefit of his trade or business, may, at any time during the term, remove them from the demised premises; but cannot after the expiration thereof unless he remain in possession and hold over, so as to create an implied renewal of the lease." *Darrah v. Baird*, 101 Pa. 265. In the late case of *Donnelly v. Frick*, 207 Pa. 597, we said: "The presumption of the law, being in favor of trade, is that a tenant does not intend to make his trade fixtures part of the realty for the permanent benefit of his landlord, but will remove them before the end of his term; and it is only when he leaves without removing them during the term that an intention of making a gift of them to the landlord is to be imputed to him. *Hill v. Sewald*, 53 Pa. 271; *Watts v. Lehman*, 107 Pa. 106. If, during the term, no intention can be imputed to the tenant to make a gift to his landlord of fixtures, which he had attached to the land for the use of his business, and he has a right to remove them during the tenancy, the same rule ought to and does apply, when, by permission of the landlord, even without a formal renewal or extension of the lease, he continues to remain on the premises for a definite or indefinite term. During such period, in the absence of any agreement to the contrary, his intention as to his fixtures remains unchanged, and his right to remove them is unaffected by his holding over." Of great weight is the following from the learned Judge COOLEY, in *Kerr v. Kingsbury*, 39 Mich. 150: "The right of a tenant to remove the erections made by him in furtherance of the purpose for which the premises were leased, is conceded. The principle which permits it is one of public policy, and has its foundation in the interest which society has that every person shall be encouraged to make the most beneficial use of his property the circumstances will admit of. On the other hand, the requirement that the tenant shall remove during his term whatever he proposes to claim a right to remove at all, is based upon a corresponding rule of public policy, for the protection of the landlord, and which is that the tenant shall not be suffered, after he has surrendered the premises, to enter upon the possession of the landlord or of a succeeding tenant, to remove fixtures which he might and ought to have taken away before. A regard for the succeeding interests is the only substantial reason for the rule which requires the tenant to remove his fixtures during the term: indeed, the law does not in strictness require of him that he shall

remove them during the term, but only before he surrenders possession, and during the time that he has a right to regard himself as occupying in the character of tenant. *Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W. 14. But why the right should be lost when the tenant, instead of surrendering possession, takes a renewal of his lease, is not very apparent. There is certainly no reason of public policy to sustain such a doctrine; on the contrary, the reasons which saved to the tenant his right to the fixtures in the first place are equally influential to save to him on a renewal what was unquestionably his before. What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal: 'If you will be at the expense and trouble, and incur the loss, of removing your erections during the term, and of afterwards bringing them back again, they shall be yours; otherwise you will be deemed to abandon them to your landlord.'"

The decree of the court below is reversed and plaintiff's bill dismissed at his costs, which include those on this appeal.

NOTE. — See, *accord*, *Daly v. Simonson*, 126 Iowa 716; *Thomas v. Gayle*, 134 Ky. 330; *Kerr v. Kingsbury*, 39 Mich. 150; *Wright v. Macdonnell*, 88 Tex. 140, 150; *Second National Bank v. Merrill Co.*, 69 Wis. 501.

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### HOLBROOK v. CHAMBERLAIN.

116 Mass. 155. 1874.

THE plaintiff leased certain premises to the defendants, and the lessees covenanted, among other things, "to quit and deliver up the premises and all future erections and additions to or upon the same, to the lessor or his assigns peaceably and quietly, at the end of the term, in as good order and condition (reasonable use and wearing thereof, and damages by fire or other casualties excepted) as the same now are or may be put into by the lessor, or those having his estate in the premises."

The auditor found that the premises were used by the defendants from April 1, 1865, until 1866, when they were changed to a cotton mill and afterwards used as such; the machinery used therein was operated by water power in the usual manner; that in 1866 the defendants placed in the mill additional machinery consisting of counter-shafting, pulleys, hangers and belts; the counter-shaft was belted from the main shaft, and with the pulleys and hangers appertaining thereto, was fastened to the timbers or floors of the building by bolts and screws, and was connected to the machines by belts. All this machinery was purchased for and adapted to the use of the mill

as a cotton mill, and all of it could be detached and removed from the building without substantial injury thereto or to the machines. On December 1, 1868, the defendants ceased to occupy the premises, and E. Fisher & Sons occupied the same as lessees of the defendants. The plaintiff assented to this assignment by writing under seal. In 1869, E. Fisher & Sons removed from the premises the said counter-shafting, pulleys and hangers to the value of \$220, and the aforesaid belts to the value of \$50, and converted them to their own use.

GRAY, C.J. It was admitted at the argument, that at the beginning of the term there was no machinery on the premises, except the main shaft. The counter-shafting, pulleys, hangers and belts, the portable boiler and the steam pipes connected with it, were either trade fixtures, removable by the lessees during the term, or personal chattels. *Poole's Case*, 1 Salk. 368; *Lawton v. Lawton*, 3 Atk. 13; *Winslow v. Merchants Ins. Co.*, 4 Met. 306, 311; *McLaughlin v. Nash*, 14 Allen, 136; *Pierce v. George*, 108 Mass. 78. The fact that the lease contained an agreement of the lessor to sell the premises to the lessees did not affect their rights in this respect.

The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order "all future erections or additions" to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to — putting such erections and additions upon the same footing, in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term. *Bishop v. Elliott*, 11 Exch. 113.

In *Naylor v. Collinge*, 1 Taunt. 19, the things removed were "buildings," coming within the very words of the covenant; and yet such of them only as were affixed to the freehold, and not such as rested upon blocks, were held to be included. In all the other cases cited for the plaintiff upon this point, the covenant either expressly named the fixtures or comprised "all improvements."

NOTE. — See *Gett v. McManus*, 47 Cal. 56; *Fox v. Lynch*, 71 N.J. Eq. 537; *Thresher v. East London Water Works Co.*, 2 B. & C. 608.

## CHAPTER V.

## EMBLEMENTS.

## PENHALLOW v. DWIGHT.

7 Mass. 34. 1810.

TRESPASS for breaking and entering the plaintiff's close, and cutting down and carrying away his corn there growing.

The parties submitted the cause to the determination of the court upon an agreed statement of facts. The defendant, at the time when, etc., was a constable of Belchertown, in which the *locus in quo* was situated, and he entered the close, and cut and carried away the plaintiff's corn thereon growing, and then fully ripe and fit to be gathered; claiming authority so to do, by virtue of an execution to him directed, then in full force, and issued in due form of law, upon a judgment of the Court of Common Pleas, for the county of Hampshire, against the plaintiff, and in favor of one Eldad Parsons. The said corn being sold by the defendant at public auction, according to law, produced the sum of twenty-two dollars, forty-nine cents, which sum, after deducting his fees, and the expenses of gathering the corn, the defendant endorsed on the said execution. If the court should be of opinion that the defendant had a right, by virtue of the authority aforesaid, to enter the said close, and cut and carry away the plaintiff's corn, in manner and for the cause aforesaid, it was agreed that judgment should be rendered for the defendant for his costs; otherwise for the plaintiff, for twenty-five dollars damage, with his costs.

CURIA. As the defendant had the right, and indeed was obliged, by the duty of his office, to enter the close of the plaintiff, and to seize any personal property of the plaintiff, whereby he might satisfy the execution he then held against the plaintiff; the only question is, whether corn, then in a proper state to be gathered, but found standing, might lawfully be cut down and disposed of, to raise the money due upon the execution. And we have no doubt that corn, or any other product of the soil, raised annually, by labor and cultivation, is personal estate; and would go to the executor, and not to the heir, on the decease of the proprietor. It is therefore liable to be seized on execution, and may be sold as other personal estate.

An entry, for the purpose of taking unripe corn, or other produce

which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil, would not be protected by this decision.

Let the defendant have judgment for his costs.

NOTE. — *McGee v. Walker*, 106 Mich. 521. As between the heirs and the administrator, the latter is entitled to crops growing on lands of the deceased.

In *Smith v. Barham*, 2 Dev. Eq. (N.C.) 420, RUFFIN, C.J., said (p. 423): "The crops growing on the land at the time of the testator's death, go to the executor as against the heir, but as between the executor and the devisee, the latter is entitled to them. The devisee takes the land by the intention of the testator, with everything on it; for as the devise carries the land against the heir, so it does the crop against the executor. The rule is so strong, that if the devise be for life with remainder over, and the first taker die before severance of the crop growing at the death of the testator, it goes over with the land to the remainder-man, in preference to the personal representative of the first taker."

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BRACKETT v. GODDARD.

54 Me. 309. 1866.

ON REPORT.

ASSUMPSIT on account annexed, for \$60, for money paid by the plaintiff to the defendant, for logs and down timber, the title to which, the plaintiff alleged, was not in the defendant at the time of sale. The writ also contained a count for money had and received for same amount.

It appeared from the report that the defendant owned, in the summer of 1863, a timber lot in Hermon; that he cut down a large number of hemlock trees thereon, peeled the bark therefrom and removed it from the lot, — intending to prepare the trees by cutting off the tops and haul them off as logs to be sawed during the ensuing winter. The trees were severed from the stumps, and they lay as they fell, with the tops on. In the felling the choppers endeavored, so far as practicable, to have them lie in a good position for peeling, and afterwards hauling them off.

In the fore part of the fall of the same year, the defendant conveyed the lot by deed of warranty, without any reservations, to one Works. On the 20th of the following November, after Works had entered into possession of the lot under his deed, the defendant sold the hemlocks thus cut, to the plaintiff, by a bill of sale. To recover back the money paid for the bill of sale, this action was brought.

APPLETON, C.J. This is an action brought to recover the price of certain logs sold by the defendant to the plaintiff. The claim is based upon an alleged failure of the defendant's title.

The defendant, while owning a lot of land in Hermon, cut down a quantity of hemlock trees thereon. After peeling the bark therefrom and hauling it off the land, he conveyed the lot to one Works, by deed of warranty, without any reservation whatever. At the date of this deed, the hemlock trees in controversy were lying on the lot where they had been cut, with the tops remaining thereon.

The defendant, after his deed of the land to Works, conveyed the hemlocks cut by him to the plaintiff. Works, the grantee of the defendant, claimed the same by virtue of his deed. The question presented is whether the title to the logs is in the plaintiff or in Works.

Manure made upon a farm is personal property and may be seized and sold on execution. *Staples v. Emery*, 7 Greenl. 201. So, wheat or corn growing is a chattel and may be sold on execution. *Whipple v. Tool*, 2 Johns. 419. Yet it is held that growing crops and manure, lying upon the land, pass to the vendee of the land, if not excepted in the deed, 2 Kent, 346, or by statute, as in this State by R. S., c. 81, § 6, clause 6. Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use, as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. Hop poles, used necessarily in cultivating hops, which were taken down for the purpose of gathering the crop and piled in the yard, with the intention of being replaced in the season of hop-raising, are part of the real estate. *Bishop v. Bishop*, 1 Kevan, 123.

Timber trees, if blown down, or severed by a stranger, pass by a deed of the land. "We think that it cannot admit of a doubt," remarks RICHARDSON, C.J., in *Kittredge v. Wood*, 3 N.H. 503, "that trees felled and left upon the land, fruit upon trees, or fallen and left under the trees where it grew, and stones lying upon the earth, go with the land, if there be no reservation." The hemlock trees were lying upon the ground. The tops and branches were remaining upon them. They were not excepted from the defendant's deed, and, being in an unmanufactured state, they must, from analogy to the instances already cited, pass with the land. Such, too, is the statute of 1867, c. 88, defining the ownership of down timber. It would have been otherwise, had they been cut into logs or hewed into timber. *Cook v. Whitney*, 16 Illinois, 481.

NOTE. — Cf. *Noble v. Sylvester*, 42 Vt. 146.

## LITTLETON, TENURES, § 68.

TENANT at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no certain nor sure estate, for the lessor may put him out at what time it pleaseth him. Yet if the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him. Otherwise it is if tenant for years, which knoweth the end of his term, doth sow the land, and his term endeth before the corn is ripe. In this case the lessor, or he in the reversion, shall have the corn, because the lessee knew the certainty of his term, and when it would end.

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COKE UPON LITTLETON, 55 a, b.

*"Yet if the lessee soweth the land, and the lessor after it is sown, etc."* The reason of this is, for that the estate of the lessee is uncertain, and therefore lest the ground should be unmanured, which should be hurtful to the Commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set roots, or sow hemp or flax, or any other annual profit, if after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that year's crop. But if he plant young fruit trees, or young oaks, ashes, elms, etc., or sow the ground with acorns, etc., there the lessor may put him out notwithstanding, because they will yield no present annual profit. And this is not only proper to a lessee at will, that when the lessor determines his will that the lessee shall have the corn sown, etc., but to every particular tenant that hath an estate uncertain, for that is the reason which Littleton expresseth in these words (*because he hath no certain nor sure estate*). And therefore if tenant for life soweth the ground and dieth, his executors shall have the corn, for that his estate was uncertain, and determined by the act of God. And the same law is of the lessee for years of tenant for life. So if a man be seised of land in the right of his wife, and soweth the ground, and he dieth, his executors shall have the corn, and if his wife die before him he shall have the corn. But if husband and wife be joint-tenants of the land, and the husband soweth the ground, and the land surviveth to the wife, it is said that she shall have the corn. If tenant *pur terme d'auter vie* soweth the ground, and *cestuy que vie* dieth, the lessee shall have the corn. If a man seised of lands in fee hath issue a daughter and dieth,



his wife being *enseint* with a son, the daughter soweth the ground, the son is born, yet the daughter shall have the corn, because her estate was lawful, and defeated by the act of God, and it is good for the Commonwealth that the ground be sown. But if the lessee at will sow the ground with corn, etc., and after he himself determine his will and refuseth to occupy the ground, in that case the lessor shall have the corn, because he loseth his rent. And if a woman that holdeth land *durante viduitate sua* soweth the ground and taketh husband, the lessor shall have the emblements, because that the determination of her own estate grew by her own act. But where the estate of the lessee being uncertain is defeasible by a right paramount, or if the lease determine by the act of the lessee, as by forfeiture, condition, etc., there he that hath the right paramount, or that entereth for any forfeiture, etc., shall have the corn.

NOTE. — The executor of the tenant for life, and not the remainderman, is entitled to the crop sown by the tenant. *Thornton v. Burch*, 20 Ga. 791.

A, tenant for life, leased to B for years. B sowed the land while he had reason to suppose that A was near his death from a fatal disease. B was held entitled to the crop. *Bradley v. Bailey*, 56 Conn. 374.

A leases land to B, at will. B sowed the land. A sold to C. B was held entitled to the crop. *Brown v. Thurston*, 56 Me. 126.

Land was devised to A during her widowhood. She married while crops were growing and was held not entitled to the crops. *Hawkins v. Skeggs's Adm'r*, 10 Humph. (Tenn.) 31.

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### KINGSBURY v. COLLINS.

4 Bing. 202. 1827.

BEST, C.J. The facts of the case are shortly these. The plaintiff complains of an assault and imprisonment. The defendants, taking no notice of the alleged imprisonment in the first count, answer, we were in possession of a close and some teazles; you came to cut the teazles, and we therefore turned you out. The plaintiff replies, you might have been in possession of the close and teazles, but you were only so under R. N. Curtis, to whom W. Curtis was tenant from year to year, and before you had any interest in the premises, he agreed with me and Derrick to cultivate teazles, of which he was to have one half, and I and Derrick the other; we cultivated them accordingly, and I entered to take what I planted.

The court are of opinion, under these circumstances, that it is immaterial in whom the possession of the close was for general purposes. Supposing it to have been in the defendant Collins, if the person from

whom he derived title had previously made a demise from year to year, and the party taking under such a demise had planted during his tenancy, the teazles he had planted would have belonged to him as emblements, even though his tenancy should have been determined before they were gathered.

It is laid down by Littleton, § 68, that a lessee at will is entitled to emblements unless he determines his own estate, and though it is otherwise with a tenant for years, *who knows the end of his term*, yet Lord Coke says, "This is not only proper to a lessee at will, that when the lessor determines his will the lessee shall have the corn sown, etc., but to every particular tenant that hath an estate *incertaine*, for that is the reason which Littleton expresseth in these words, *Pur ceo que il nad ascun certaine ou sure estate.*" Co. Lit. 55 b. A tenant from year to year does not know in what year his lessor may determine the tenancy by half a year's notice to quit: in that respect at least, he has an uncertain estate: the public interest requires that he who grows a crop shall have a right, where his landlord determines the tenancy, to claim it as emblements; otherwise every tenant from year to year whose holding commences at Michaelmas, and who plants his crop early in the spring, may, by a notice to quit given at Lady-day, be deprived of the fruit of his labours whenever the harvest is protracted beyond Michaelmas. Therefore, although the tenancy of W. Curtis might have been determined before the teazles were mature, yet he and the plaintiff had a right to enter for the purpose of gathering the teazles which the plaintiff had planted during the tenancy. It has been objected that it does not appear that William Curtis's interest continued at the time of his entering into the agreement with Derrick and the plaintiff; but it is stated that he made the agreement being so possessed (that is, possessed under the demise from R. N. Curtis), and upon general demurrer, at least, that is a sufficient allegation of his title. Where a tenancy expires, not by efflux of time, but by some act determining the tenancy, it is for the party who asserts the determination of the tenancy to shew that such act has taken place. A tenancy from year to year can only end by some act on the part of the lessor or lessee, and in that respect differs from a term for a certain number of years. We are of opinion, therefore, that it sufficiently appears upon these pleadings that at the time of the trespasses complained of, the plaintiff had a right to be in the close in question for the purpose of gathering his teazles, and that the replication is a sufficient answer to the pleas.

The second and third set of pleas justify the imprisonment complained of in the plaintiff's second and third count, on the ground that he was trespassing on the defendant's property; but although that might be a justification of a removal, if the plaintiff could not shew a right to remain where he was, it has never been holden of itself a justification of an imprisonment.

*Judgment for the plaintiff.*

## SIMPKINS v. ROGERS.

15 Ill. 397. 1854.

TREAT, C.J. This was an action of trover, brought by Simpkins against Rogers, to recover the value of the crops raised on a certain tract of land in the year 1853. The plaintiff proved this state of facts. Bache, being the owner of the land in question, conveyed the same to the plaintiff on the 30th of November, 1852. The deed was acknowledged on the 3d, and recorded on the 24th of December, 1852. The defendant raised wheat, saffron, and osage orange plants on the land in 1853, to the value of \$500, and appropriated the same to his own use before the commencement of this suit. In the spring of 1853, the plaintiff notified the defendant not to sow or plant the land; and in the fall of that year, he gave him notice not to harvest or remove the crops. The defendant read in evidence a letter from Bache to himself, dated the 12th of June, 1852, as follows: "I have no objections to your using the piece of land you speak of, but hope you will leave it in good order, and seed it down with timothy or redtop when you are done with it. I do not know that I would like to sell it at present, as I might, by so doing, injure the sale of the remaining part, as it would probably be an object to the purchaser to have the privilege of both sides of the railroad. I am willing to sell the whole that I have there, provided I can get a fair price." He also read another letter from Bache, dated the 14th of December, 1852, in these words: "It is true I have sold Simpkins the piece of land. I had entirely forgotten that I had given you the privilege of using it. I regret very much that this should have happened. I assure you I never would have sold it, without reserving the privilege I had granted to you. If he should refuse to let you have the use of the land, I should consider him guilty of deception towards me, as he must have known that you had the promise of the use of the ground by your breaking it." The plaintiff objected to the introduction of this letter. The defendant likewise proved that he broke the land in June, 1852, for the purpose of planting it in osage orange the spring following; and that this was known to the plaintiff at the time. On this evidence, the court found the issue for the defendant, and rendered judgment in his favor.

The second letter of Bache was clearly inadmissible. He had previously parted with all interest in the land; and he could not by any subsequent statements disparage the title of the plaintiff. The declarations of a grantor, made after the grant, are not receivable in evidence to prejudice the rights of the grantee.

If the first letter from Bache and the breaking of the land by Rogers could together be construed as creating a tenancy, it manifestly was but a tenancy at will, determinable at the pleasure of the

lessor. It merely authorized Rogers to use and occupy the land for the time being. It gave him no right to retain the possession for any certain time. Bache held the land for sale, and he was not disposed to make a lease that might interfere with that purpose. While he continued to be the owner, he was willing that Rogers should enjoy the land without charge. But he reserved the right to determine the tenancy at pleasure; and Rogers entered upon the land, subject to this right of the owner. It was competent for Bache, or his grantee, to put an end to the tenancy and regain the possession, upon giving reasonable notice to Rogers. Where a tenancy at will is determined by the lessor, the tenant is entitled to the emblements, and to a reasonable time for the removal of his family and property, with free ingress and egress for the exercise of these rights. Beyond this, he can assert no rights under the lease. 4 Kent's Com. 110; *Ellis v. Paige*, 1 Pick. 43; *Davis v. Thompson*, 13 Maine, 209; *Love v. Edmonston*, 1 Ired. 152. In this case, the plaintiff became the owner of the land, and notified Rogers not to occupy or cultivate the same, before anything was done under the lease except the breaking. He thus determined the tenancy, and entitled himself to immediate possession of the land. As Rogers neither resided on the land, nor had any crops growing thereon, it was his duty to surrender the possession at once, and leave the plaintiff in the exclusive enjoyment of his property. The crops were raised by Rogers in his own wrong, and he had no right to remove them from the land.

We are, however, not inclined to hold that there was any tenancy in the case. One of the essential qualities of a lease was wanting, the reservation of rent to the owner. We regard the transaction as a mere permission by Bache to Rogers to enter upon and occupy the land. While this license remained in force, it was a sufficient authority to Rogers to use and enjoy the land. But it was revocable at the will of Bache or his grantee. It was revoked by the plaintiff, and from that time Rogers ceased to have any right or interest in the land. It might well be, if Rogers had crops growing on the land, that the license could not be revoked until the same were matured and harvested. But the permission was withdrawn before the sowing of the land. The law upon this branch of the case was fully discussed in *Woodward v. Seeley*, 11 Ill. 157.

On the evidence, the plaintiff was clearly entitled to recover. The crops in question were his property, and trover was maintainable for them. *Mooers v. Wait*, 3 Wend. 104; *Sallade v. James*, 6 Barr, 144; *Crotty v. Collins*, 13 Ill. 567; *Farrant v. Thompson*, 5 Barn. & Ald. 826.

The judgment is reversed, and the cause remanded.

NOTE.—In *Price v. Pickett*, 21 Ala. 741, the court said (p. 743): "In relation to emblements, the right of the tenant was unquestion-

ably conferred for the encouragement of agriculture: but this right has never been held to obtain until the seed is sown, and the common law has drawn a distinction between the right to emblements and the costs of the preparation of the ground for the reception of the seed; as where the tenant at will is ousted after ploughing and manuring the land, he wholly loses his costs and labor, although if he had planted he would have been entitled to the emblements. Bro. Ab. Title, Emblements, 7. If, therefore, the term of the lessee was determined by the death of the tenant for life, he would only be entitled to the emblements of the land then seeded. *Thompson v. Thompson*, 6 Mun. 518."

*Harris v. Frink*, 49 N.Y. 24. B entered upon the land of A, under an unenforceable contract of sale, and sowed the land. A expelled him from the land. B was held entitled to the crop.

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### WHITMARSH v. CUTTING.

10 Johns. (N.Y.) 360. 1813.

IN error, on *certiorari*, from a justice's court. Whitmarsh brought an action of trespass *quare clausum fregit* against Cutting, for entering his close and carrying away a quantity of wheat and rye. The defendant pleaded not guilty; and there was a trial by jury. The plaintiff proved that, in August, 1812, the defendant entered his close and took and carried away the wheat, etc.

The defendant then proved that the wheat and rye had been levied upon by a constable, on an execution against one Hilton, and that the defendant assisted the constable in carrying the grain away. The defendant offered Hilton as a witness to prove that the grain belonged to Hilton, who was objected to, as interested, but admitted by the justice. Hilton testified that he entered on the premises in April, 1810, under a lease from the owner of the land, for one year from the 20th April, 1810; and on the 10th June, 1810, the owner, by endorsement on the lease, agreed to let Hilton have the farm for another year; it was admitted that the plaintiff was lessee of the owner, and that in May, 1812, Hilton was ousted under the act against forcible entry and detainer. The grain was sown by Hilton, but reaped and gathered by the plaintiff, after his entry in May, 1812.

The question submitted to the jury was, whether he was entitled to the grain as emblements. The jury found a verdict for the defendant.

PER CURIAM. The verdict was clearly against law. The crop sown did not belong to Hilton, but to his successor. This lease was for a year certain, and then renewed for the next year; and it was his

fully to sow when he knew that his term would expire before he could reap. The doctrine of emblements is founded entirely on the uncertainty of the termination of the tenant's estate. Where that is certain there exists no title to emblements. Without touching any other points, we are of opinion that the verdict was against law and evidence, and that the judgment below must be reversed.

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STULTZ v. DICKEY.

5 Binn. (Pa.) 285. 1812.

YEATES, J. The present appeal naturally divides itself into three questions:—

1. Is a tenant for a term certain entitled to his way-going crop, without special provision for that purpose in his lease? . . .

I take the first question to have been fully put to rest by the decision of the court at Lancaster Nisi Prius in June, 1782, between Michael Diffedorffer and others, plaintiffs, and John Jones, defendant. There the agents of forfeited estates had leased to the defendant the lands of Michael Whitman, an attainted traitor, for one year from May, 1778, till May, 1779, at a certain rent, and the lease was continued for a second year ending the 1st of May, 1780. The agents, under the order of the Supreme Executive Council, sold the lands to the plaintiffs in August, 1779, and for the wheat and rye put in during the fall of that year, and reaped in the following year, the replevin was brought. Several witnesses, including two of the jurors, were examined as to the custom of the country, that tenants for years who did not receive crops at the commencement of their leases, were entitled to take off the crops which had been sown during the continuance of their leases. The court were clearly of opinion that the defendant was entitled to the crop, which he had put in during his lease, and the jury found accordingly. Though I was dissatisfied with the opinion then delivered, I have never heard the doctrine questioned since. I have adverted to this case in *Carson v. Blazer et al.*, reported in 2 Binn. 487. Such custom is said in our books not to alter or contradict the agreement in the lease, but only to super-add a right, which is consequential to the taking, although not mentioned therein. There can be no doubt if the tenant was restricted, by the terms of his lease, from removing the grain after his time was expired, that he would be bound by his contract; and I apprehend the privilege of the tenant in general is confined to a reasonable quantity of the lands, in proportion to the residue thereof, according to the course and usage of husbandry in the same parts of the country. The privilege is founded on the highest equity, and conduces to the extension of agriculture.

## SANDERS v. CHANDLER.

26 Minn. 273. 1879.

GILFILLAN, C.J. Action for taking and converting a quantity of wheat. The defendant justified, as sheriff of the county of Goodhue, under an execution issued upon a judgment against James Sanders, who is plaintiff's husband. On the trial the plaintiff introduced evidence that the wheat taken was hers, and was raised on a farm managed by her, which, in 1868, was conveyed by one Nugent to said James Sanders, and, in 1871, by James Sanders and plaintiff to one Ward, and by Ward the next day to plaintiff.

The defendant introduced the judgment and execution under which he justified, and other evidence not of itself tending to disprove plaintiff's title, nor to disprove that she managed and controlled the farm, and then offered to show that the conveyance from Ward to her, in 1871, was made without any consideration, and for the purpose of hindering, delaying and defrauding the creditors of James Sanders, plaintiff's husband, and for the purpose of hindering, delaying and preventing the collection of the debts of James Sanders then existing, and those to be contracted by him in the future. This was objected to as incompetent and immaterial, and excluded. The judgment under which the defendant justified was rendered five and a half years after the conveyance, upon an indebtedness incurred more than four years after, and it does not appear, nor was there any offer to prove, that at the date of the conveyance the plaintiff in the judgment was a creditor of James Sanders. The defendant thereupon rested his case. The court then, upon plaintiff's motion, withdrew from the consideration of the jury the execution introduced by defendant, and, both parties having rested, instructed the jury to render a verdict for plaintiff for the value of the wheat taken, which the jury did.

It may be doubted if the reason given by the court below, on the trial, for withdrawing the execution introduced by defendant from the consideration of the jury, was correct; but its action was correct, for, as the evidence stood, there was nothing from which the jury could have found that the wheat was not the property of the plaintiff, and, therefore, the execution could have no effect in the case; and for the same reason the instruction to the jury to render a verdict for plaintiff was correct.

The evidence offered by defendant, and excluded, as to fraudulent intent in the transfer of the farm to plaintiff, in 1871, would not, if admitted, with all the other evidence in the case, have shown that plaintiff did not own the wheat, nor justified the jury in so finding. The validity of that transfer as against creditors was not directly in

issue, nor was the creditor in the judgment under which defendant justified in position to impeach the transfer, unless for an incidental purpose; for he was not a creditor at the time of the transfer; nor does the offer include evidence of a scheme by which he was to be induced to give credit to James Sanders, and to be prevented, by such transfer, from collecting his debt to be so incurred.

It is unnecessary to determine whether, if the evidence already introduced tended to show that James Sanders was in possession of the wheat, or that he managed and controlled the farm, or received or enjoyed the proceeds, the evidence offered would have been proper, in corroboration or explanation of such evidence, to characterize, as it were, the acts of the parties in reference to this wheat, the property directly in question. For the evidence is uncontradicted that plaintiff, from the time of the transfer to her, managed and controlled the farm and the crops from it for her own use and benefit, as she had a right to do, under her title to the farm, and while it remained in her. The fact that the farm was transferred to her with intent to defraud the grantor's creditors would not, of itself, defeat her right to the crops raised by her upon the farm. The court was, therefore, right in excluding evidence of the fact.

*Order affirmed.*

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STOCKWELL v. PHELPS.

34 N.Y. 363. 1866.

WRIGHT, J. The land from which the hay in controversy was cut, was, at the time of the cutting, in the actual possession of one Owen Wild, he claiming the premises as his own, and holding them adversely to the plaintiffs, who had the title in fee. While thus in actual possession, holding adverse to the plaintiffs, Wild sold and delivered the hay to the defendant, whereupon the plaintiffs brought replevin for the same. The referee held that the plaintiffs could not recover for the hay, and gave judgment for the defendant.

The judgment was right. Wild, when the action was commenced, was in the actual possession of the premises from which the hay in question was cut, claiming them as his own, adversely to the plaintiffs; and whatever right the plaintiffs might have had to maintain an action after obtaining possession of the premises, it is clear they had no right of action whatever when this one was commenced. Replevin, or an action in the nature of replevin, *in the cepit*, can only be brought when trespass could be maintained, and that will only lie for an injury to land when the plaintiff is in possession (*Brets v. Bahn*, 3 Denio, 79; *De Mott v. Hagerman*, 8 Cow. 220); and Wild, being in the actual possession of the premises, claiming them as his



own, is regarded as the owner as to all the world until after a judicial decision. The remedy of the plaintiffs was a judgment against Wild for mesne profits in an action of ejectment, or by action of trespass after having got possession of the land.

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## THOMES v. MOODY.

11 Me. 139. 1834.

MELLEN, C.J. On the 14th of May, 1832, the defendant, one of the sons of the late Edmund Moody, was peaceably occupying and possessing the farm and dwelling house thereon standing, of which his father died seized, and on that day, he was in a forcible and unlawful manner turned out of possession of the same by the plaintiff, Samuel Moody, and some others; and, with force and a strong hand, he was kept out of possession until the 28th of February, 1833, at which time he was restored to and regained the possession. It is not pretended that the plaintiff has, or ever had any title to the said farm; he was, during the period of his unlawful possession, merely the lessee of William Thomes; and he had no other title than under a deed from the above-named Samuel Moody, who, at the time of making the deed, had neither a title to the farm nor even possession. The hay and wheat, for which the present action of trover is brought, grew on the farm during the tortious and unlawful possession of it by the plaintiff, and the defendant, when he regained possession, found the above property there and appropriated the same to his own use. Can the plaintiff maintain this action?

The act of the plaintiff and his associates in turning the defendant out of possession was a trespass, for which he could at once have maintained an action of trespass against all concerned, or any of them. But the plaintiff's counsel says, that the above act of dispossession and exclusion amounted to a disseizin. If we so consider the conduct of the plaintiff, will it aid him in this action? It is a well-settled principle of law, that if a disseizee, having a right of entry, enters, he may afterwards have trespass against the disseizor, with a *continuando* for the whole time of his possession. Co. Lit. 257, a; 2 Roll. 550; 5 Comyn's Digest, Trespass, B 2; *Cox v. Callender*, 9 Mass. 533.

In the present case, the defendant was restored to his possession of the premises, in about nine months after his expulsion; and the manner of his restoration did not give him less perfect rights than he would have acquired by a lawful entry in the usual form; he, therefore, on regaining his possession, had a legal right to recover damages against the plaintiff, for all injuries done to him by such violence, trespass and exclusion. This being undisputed law, on what ground

can this wrongdoer be permitted to recover the fruits of his wrong, against him whom he has wronged, who is also an owner in fee of the land which produced the hay and wheat in question?

This view of the case seems to do away with the distinction, made by the plaintiff's counsel, between this and the case of *Higginson et al. v. York*, 5 Mass. 341; as the court said, in the case of *Cox et al. v. Callender*, "the entry of the disseizee, when he has a right of entry, changes the disseizin into a trespass;" and so, according to *Higginson et al. v. York*, the plaintiff, by his wrongful acts, acquired no property in the product of his labor, as against the owner of the land; although he might maintain an action of trespass or trover against a stranger, for the taking or appropriating such property without his consent.

*The verdict must be set aside and a nonsuit entered.*

NOTE. — See *McGinnis v. Fernandes*, 135 Ill. 69; *Hooser v. Hays*, 10 B. Mon. (Ky.) 72; *Stebbins v. Demorest*, 138 Mich. 297.

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PAGE v. FOWLER.

39 Cal. 412. 1870.

TEMPLE, J. The plaintiff was in possession of about eight hundred acres of land, which had been inclosed for many years, and which he claimed to own under the so-called Suscol grant. In the summer of 1862, while crops put in by plaintiff were still growing upon the land, the defendants entered, claiming one hundred and sixty acres of land each, as pre-emptioners. They built small houses upon their respective claims, where they afterwards lived. They each possessed the requisite qualifications to become pre-emptioners, and each took the necessary steps to enter the lands in the proper land office of the United States. They were unsuccessful, however, in their attempts to pre-empt, and the plaintiff finally recovered a judgment against them for the land. In May, 1863, while they were in possession, and before the judgment in ejectment, they cut a quantity of hay upon the land, which was taken by the plaintiff by the writ of replevin in this suit.

There is no question that, at the time this action was commenced, the rights of the parties, with reference to the property in controversy, are exactly the same as in the former case of *Page v. Fowler*; but before this case was actually tried, plaintiff had recovered a judgment of ejectment against the defendants, and, as he claims, had been put into possession, and he now claims that the rule laid down in the former case cannot apply to this; that the reason why the plaintiff, out of possession, cannot recover against the defendant in the ad-

verse possession, claiming to be the owner, is because the personal action cannot be made the means of trying title; but that he may, under our system, by means of the sixty-fourth section of the Practice Act, commence his action for possession, and also separate actions for rents and profits, and for trespass or waste; and if, at the trial of his action of trespass or waste, he shows his judgment for the recovery of the land, it will be evidence of his right to recover for the trespass or waste, and that, upon the same principle, the plaintiff is entitled to recover in this case. I know of no warrant for this construction of the sixty-fourth section of the Practice Act; but, independently of that, I think the proposition not maintainable upon principle.

It is undoubtedly true, that, at common law, a person who had been ousted from land might, after a recovery and re-entry, maintain his action of trespass for the mesne profits and for waste, for the reason that after re-entry the law supposes he has always been seized and the acts of the defendant were a continuous trespass upon the rightful possession of the plaintiff; but no case has been cited in which this principle has been held to make the owner of the land out of possession, under such circumstances, the owner of the crops grown and actually harvested by the defendant. The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops; for, as was well said in the case of *Stockwell v. Phelps*, 34 N.Y. 363, the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce.

NOTE. — See, *accord*, *Johnston v. Fish*, 105 Cal. 420; *Lindsay v. Winona R.R. Co.*, 29 Minn. 411; *Jenkins v. McCoy*, 50 Mo. 348; *Faulcon v. Johnston*, 102 N.C. 264; *Phillips v. Keysaw*, 7 Okl. 674; *Churchill v. Ackerman*, 22 Wash. 227.

## CHAPTER VI.

## WASTE.

## MARSHALL v. MELLON.

179 Pa. 371. 1897.

ASSUMPSIT for accrued rent upon an oil and gas lease. Before STOWE, P.J.

At the trial it appeared that on the death of her husband the plaintiff became vested with a life estate in the land covered by the lease, and that it had never been operated for oil or gas. On February 17, 1885, plaintiff executed a lease of the land to W. A. Mellon for the sole purpose of mining for oil and gas. The lease was for the full term of plaintiff's life, and was subsequently assigned to defendants. No actual possession of the premises was taken by the lessee or his assignees, nor was any attempt made to operate the land, nor was any payment of rentals made.

Verdict for plaintiff subject to the question of law reserved as to whether the plaintiff was entitled to recover under all the evidence in the case. Judgment was entered for defendants *non obstante veredicto*.

OPINION BY MR. JUSTICE GREEN, January 4, 1897:

In *Stoughton's Appeal*, 88 Pa. 198, we said: "Oil, however, is a mineral, and being a mineral is part of the realty. *Funk v. Halde-man*, 53 Pa. 229. In this it is like coal or any other mineral product which *in situ* forms part of the land." In *Gill v. Weston*, 110 Pa. 312, we said of petroleum, "It is a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Westmoreland Nat. Gas Co. v. De Witt*, 130 Pa. 235, we said, "Gas it is true is a mineral, but it is a mineral with peculiar attributes." In *Blakley v. Marshall*, 174 Pa. 425, a lease for oil and gas purposes was made by lessors who were tenants for life and also as trustee for those in remainder. The leased premises proved to be productive. A question arose upon a case stated as to the interests respectively of the life tenants and those in remainder. The life tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the

life tenants during their joint lives and the life of the survivor, and at the death of the latter to pay the principal to the remainder-men. This court sustained the court below and said, "As was said in *Stoughton's Appeal*, 88 Pa. 198, and other cases in the same line, oil in place is a mineral, and being a mineral is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. If there be life tenants and remainder-men the former are entitled to the enjoyment of the fund (interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remainder-men." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land, lest it should be drawn away by other wells on adjacent premises. In that respect of course there is a difference between oil and gas and solid minerals, but in respect of the interests of life tenants as contrasted with those in remainder there was no departure from the common law rule that tenants for life only may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Co.'s Appeal*, 85 Pa. 344, where we held that while the life tenant's right to work previously opened mines was undoubted, there was no right in a life tenant of several tracts to open a new mine on one of the tracts upon which no previous opening had taken place. MERCUR, J., said, in the opinion, "neither tract is appendant or appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right, therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum, oil or gas," and "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that as no interest whatever was acquired under the lease, the lessees are under no obligation to pay

for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character of oil and gas as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or nearby lands, in order to preserve the interests of both life tenants and remainder-men, it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end.

*Judgment affirmed.*

NOTE. — A life tenant took clay from the soil and manufactured it into bricks. This was held to be waste. *University v. Tucker*, 31 W.Va. 621.

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### GAINES v. GREEN POND MINING CO.

33 N.J. Eq. 603. 1881.

VAN SYCKEL, J. The bill in this cause was filed by the complainants as owners of the remainder in fee of a large tract of wild lands in the county of Morris, to restrain the defendants, who, it is alleged, have only a life estate in said lands, from cutting timber and working the iron mines on said premises, and also praying for an account.

The land in question is very rough and mountainous, and almost all of it unfit for cultivation. On it there is a thin covering of wood and timber, with a large deposit of valuable iron ore underlying it. About the year 1812, Dr. Graham, then owner of the fee, excavated the iron ore for the purpose of manufacturing copperas, sulphur being combined with it in such proportions as made it available for that purpose. He made at least two openings, from ten to fifteen feet deep, out of which the ore was raised, and carried on this business for several years. There was erected upon the premises a building used for pounding the ores, and other apparatus for treating them. There was no digging for ore from the time Dr. Graham quit working (about 1812 or 1814) until about forty years ago, when a small quantity of ore was taken out and tested at two different forges in the neighborhood, and was considered to be without value as iron ore, on account of the sulphur it contained. From that time there has been no mining upon these premises until the Green Pond Iron Company commenced its operations in 1872.

By the strict rule of the common law, the opening and working of a mine by a tenant for years, not opened in the lifetime of the

previous tenant in fee, was, equally with the cutting of timber, an undoubted waste of the estate. In *Hoby v. Hoby*, 1 Vern. 218, the widow was held to be dowable of a coal work. It was resolved in *Saunders's Case*, 5 Coke 12, that "if a man hath land in part of which there is a coal mine open, and he leases the land to one for life, or for years, the lessee may dig in it; for inasmuch as the mine is open at the time, and he leases all the land, it shall be intended that his intent is as general as his lease."

The tenant for life, subject to waste, cannot open a new mine. *Whitfield v. Beuitt*, 2 P. Wms. 240.

And if a lease of land be made, and some mines are open and some not, the open mines only can be wrought. *Astry v. Ballard*, 2 Lev. 185.

But a tenant for life may open the earth in new places in pursuit of an old vein of coals, when the coal mine had been opened before he came in possession of the estate. *Clavering v. Clavering*, 2 P. Wms. 388.

*Stoughton v. Leigh*, 1 Taunt. 402, was a case directed out of the high court of chancery for the opinion of the law judges.

The case involved the right of the widow to dower in certain mines on an estate of which her husband had died seized. The mine had been opened and wrought, but had ceased to be worked long prior to the husband's death. The question was whether the widow, in virtue of her estate in dower, was entitled to work the abandoned mine for her own benefit.

The judges answered that the widow was dowable of all the mines which had been opened and worked in her husband's lifetime, and "that her right to be endowed of them had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband, in his lifetime, or by those claiming under him, since his death."

In *Viner v. Vaughan*, 2 Beav. 466, Lord LANGDALE said: "A tenant for life has no right to take the substance of the estate by opening mines or clay-pits; but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it, and for this reason that the author of the gift has made them part of the profits of the land."

A temporary injunction was granted, so that the right of the life tenant to work the clay-pits might be passed upon. That this case did not receive a thorough consideration is shown by the fact that *Stoughton v. Leigh* was not referred to.

This subject was carefully considered by Lord ROMILLY, in *Bagot v. Bagot*, 32 Beav. 509, where he says: "With respect to the abandoned, or, as they are called in the pleadings and evidence, the dormant mines, I am of opinion that it has not been shown that he committed waste in working those mines. It is always a question of

degree to be established by evidence, whether the working of a mine which has been formerly worked, is waste or not. There is no doubt that a tenant for life, though impeachable for waste, may properly work an open mine. A mine not worked for twelve months, or two years, previously to the tenant for life coming into possession, must still be considered an open mine. A mine which has not been worked for one hundred years cannot, I think, be properly so treated. My present opinion is, that a mine which had not been worked for twenty or thirty years, from the loss of profit attending the working, might, without committing waste, be worked again by a succeeding tenant for life. But, if the working of the mine had been abandoned by the owner of the inheritance many years previously, with a view to some advantage which he considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral, I doubt whether a succeeding tenant for life could properly treat that as an open mine."

In *Elias v. Griffith*, L. R. (4 App. Cas.) 465, Lord SELBORNE says: "Upon the questions of law which were argued at the bar, I think it unnecessary to make more than two remarks. The first is, that I am not at present prepared to hold that there can be no such thing as an open mine or quarry, which a tenant for life, or other owner of an estate impeachable for waste, may work, unless the produce of such mine or quarry has been previously carried to market and sold. No doubt if a mine or quarry has been worked for commercial profit, that must, ordinarily, be decisive of the right to continue working; and, on the other hand, if minerals have been worked or used for some definite and restricted purpose (*e.g.*, for the purpose of fuel or repair to some particular tenements), that would not alone give any such right. But if there has been a working and use of minerals not limited to any special or restricted purpose, I find nothing in the older authorities to justify the introduction of sale as a necessary criterion of the difference between a mine or quarry which is, and one which is not, to be considered open in a legal sense. None of the *dicta* which are to be found in some of the more modern cases (each of which turned upon its own particular circumstances) can have been intended to introduce a condition or qualification not previously known, into the law of mines.

"The other observation which I desire to make is, that when a mine or quarry is once open, so that the owner of an estate impeachable for waste may work it, I do not consider that the sinking a new pit on the same vein, or breaking ground in a new place on the same rock, is necessarily the opening of a new mine or quarry; and for this, authority is to be found in the cases which were cited at the bar, of *Clavering v. Clavering*, *Bagot v. Bagot*, and *Lord Cowley v. Wellesley*."

In *Elias v. Griffith*, L. R. (8 Ch. Div.) 521, Lord COTTON remarked



that "To enable a termor, or tenant for life punishable for waste, to work mines, it must be shown that the owner of the inheritance, or those acting by his authority, have commenced the working of the mines with a view to making a profit from the working and sale of what is part of the inheritance. When this is established, though no profit has in fact been made, the mine is open in such a sense as to justify the continuance of the working by a termor."

The case of *Clavering v. Clavering*, 2 P. Wms. 388, which recognizes the right of the life tenant to open new pits or shafts, for the working of an old vein of coal, has never been overruled in the English courts.

These citations show that, in England, the life tenant has a right to use a mine for his own profit, where the owner of the fee in his lifetime has opened it, even though he may have discontinued working upon it for a long period of years.

The rule by which the right of the life tenant is to be tested is not the length of time that may have elapsed since the last working of the mines, but it depends upon whether the owner of the fee merely discontinued the work for want of capital, or because it did not prove profitable, or for any other like reason, or whether he abandoned it with an executed intention to devote the land to some other use.

A mere cessation of work, for however long a period, will not defeat the life tenant's right; but an abandonment for a day, with a view, in the language of Lord ROMILLY, "to some advantage to the property, which the fee owner considered would accompany such discontinuance, apart from the profits to be made from the sale of the mineral," would extinguish any claim on the part of the life tenant. If the fee owner should sink a shaft, and afterwards erect a dwelling-house over it, or if he should fill it up and devote the space to agricultural purposes, it would indicate, so clearly, his intention to devote his estate to other uses than mining, that the life tenant could not base any right upon the prior opening.

The distinction between mere cessation of use and such an abandonment as has been adverted to, is recognized in the cases in this country.

In the New York Supreme Court, a widow was held to be dowable of a bed of iron ore, although the openings which had been made by the husband had been partly filled up and the work discontinued in his lifetime. *Coates v. Cheever*, 1 Cow. 460.

Chief Justice SHAW, in *Billings v. Taylor*, 10 Pick. 460, expresses the like view: "Whatever doubts may have been formerly entertained, it seems now to be well settled that a widow is entitled to dower in such mines and quarries as were actually opened and used during the lifetime of the husband, and it makes no difference whether the husband continued to work them to the period of his death, or

whether they have been continued since his death, by the heir or his assignee."

*Stoughton v. Leigh*, *Coates v. Cheever*, and *Billings v. Taylor*, are cited with approbation by Chancellor GREEN, in *Reed v. Reed*, 1 C. E. Gr. 248.

The American cases have modified the law of waste, to adapt it to the circumstances of a new and growing country, in order to encourage the tenant for life in making a reasonable use of wild and undeveloped lands. *Hastings v. Crunckleton*, 3 Yeates 261; *Findlay v. Smith*, 6 Munf. 134; *Ballentine v. Poyner*, 2 Hayw. 110; *Neel v. Neel*, 7 Harris 323; *Irwin v. Covode*, 12 Harris 162.

In *Neel v. Neel*, a coal mine had been opened and worked for family use, and for the benefit of the neighbors, but a very inconsiderable quantity had been taken out. In that case, Judge LOWRIE said: "It seems, in this case, that the author of the gift had sometimes sold coal out of the pits, but I do not conceive this to be material. It is sufficient that he opened them and derived any profit from them, even if it were only private. And the decisions refer to coal mines, iron mines, etc., and the tenant for life may work them, even though the working of them may have been discontinued before the death of him through whom the estate comes, and, if necessary to the proper working of them, may make new openings in the ground."

In support of these views he cites the English and American cases, and expresses himself without reference to the statute of 1848.

Chancellor Kent says: "The American doctrine on the subject of waste is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country." 4 Comm. 76.

The cases referred to will show a strong inclination to amplify the privileges of the life tenant.

In a country like this, where there are such vast bodies of unimproved lands, which would otherwise lie dormant in the hands of the life tenant, public policy requires that the doctrine of waste should be liberalized, and the decisions have uniformly been in that direction.

The present case illustrates the hardship of a close rule in favor of the fee. The life estate vested in 1860, and there is an expectancy of twenty years more of this life. A construction of the law which locks up the land from all beneficial use for so long a period, and gives the life owner only the privilege of paying the land tax, should not be favored.

When the property is unimproved land, not adaptable to any other beneficial use than that of mining, the right of the life tenant to use it reasonably for such purpose has some support in the adjudications in this country, and is certainly not without reason to uphold it.

To maintain the right of the appellants in this case, it is not necessary to broaden the rule to that extent.

The openings in this case were such as, under the English cases, will establish the right in the life estate to pursue the workings upon the veins which had been opened.

It is sufficient to show that openings were made and ore taken out with a view to profit, and it is wholly immaterial whether the ore was used in the manufacture of copperas or for some other commercial purpose.

The evidence shows a mere cessation of the work, not such an abandonment, in the legal sense of that term, as will defeat the right of the life tenant. The length of time during which cessation continued is immaterial, so long as the fact of abandonment is not established.

The decree of the chancellor, so far as it denies the right of the appellants to work the veins of ore upon which the openings had been made in the lifetime of the owner of the fee, and so far as it enjoins such work, should be reversed, and in other respects affirmed.

*Decree unanimously reversed.*

NOTE. — A, tenant in fee simple, leased land to B for mining purposes, reserving rent. B did not begin mining operations in the life of A. A died, and the widow of A was assigned dower in the land, and was held entitled to the rent. *Priddy v. Griffith*, 150 Ill. 560.

In *Billings v. Taylor*, 10 Pick. (Mass.) 460, SHAW, C.J., said (p. 461): "The only question appears to be, whether it is sufficiently shown by the special verdict, that the whole of the slate quarry described therein was opened and wrought previously to the death of the demandant's husband, so that it ought to be taken into consideration, in connexion with the residue of his estate, and dower assigned in the whole; and the court are all of opinion that it was. A tract of about four acres lying together contained the slate quarry, about a quarter of an acre of which had been dug over. The stone lay partly above, and the residue immediately under the surface, and as in going down, the quality improved, the practice had been to take a section of ten or twelve feet square, and to go down to the usual depth, and then begin on the surface again. We think it would be too narrow a construction to say that no part of this quarry was opened except that portion which had been actually dug; but it must be considered that the whole, lying together as one tract, belonging to one estate, and wrought in the manner described, was opened, and therefore that the widow was entitled to dower in that, as well as the other estate of which her husband had been seised during the coverture."

## PADELFORD v. PADELFORD.

7 Pick. (Mass.) 151. 1828.

THIS was an action of waste against a tenant in dower.

The woodland described in the declaration was disconnected from the homestead farm of the defendant's husband (on which she has lived since his decease), and distant from it about two miles. The husband cut wood on this land and used it for fire-wood; and the defendant had not cut an unnecessary quantity for this purpose. She cut *sparsim* over the whole lot. There were upon the lot several pine trees fit for fire-wood, some of which the referees thought she might have rightfully cut for fire-wood, but oak had been mostly or wholly cut by her.

The reversionary interests in the woodland and in the homestead were in different individuals. The defendant cut upon the woodland four white-oak timber trees, from which posts were made and used in repairing fences on the homestead. She likewise cut two white-oak trees on the woodland, which were sold by her for machine shafts, she receiving in exchange a quantity of fire-wood as great or greater than the trees would have made if used for that purpose.

PER CURIAM. The referees have reported that the defendant cut oak trees for her necessary fuel. This she had a right to do. Oaks are found here in so great abundance that they are not more valuable than other trees, and they are in common use for fuel. Neither was it waste to cut the four timber trees used for posts. The only waste which was done consisted in cutting the other two timber trees and selling them; and though the defendant took fire-wood in exchange, this is no justification; and she might have procured sufficient fire-wood without resorting to that measure.

NOTE. — On cutting timber to keep fences and buildings in repair, see *Calvert v. Rich*, 91 Ky. 533. On cutting it for fire-wood for the use of a servant living off the land, see *Gardiner v. Deering*, 1 Paige (N.Y.) 572.

## WILKINSON v. WILKINSON.

59 Wis. 557. 1884.

APPEAL from the Circuit Court for Grant County.

This is an action by children and grandchildren of John Wilkinson, deceased, who are also the residuary devisees named in his will, to restrain the widow of said deceased from committing waste upon the homestead occupied by her as such widow, by cutting and selling

timber therefrom; and to recover damages for the timber already cut. The complaint alleged, among other things, in effect, that the land where the timber was so cut was unfit for agricultural purposes, and only fit to grow timber, and that the defendant had cut and sold posts therefrom to the value of \$70, and was continuing such acts of waste. The cutting was alleged to have commenced January 1, 1882, and a temporary injunction was issued February 8, 1882.

The answer admitted the cutting of posts to the value of \$35, and alleged, in effect, that there were only fourteen acres of the land that was then plow land, and that the rest thereof was pasture and timber; that there was more timber than was needed or profitable; that the timber she had and proposed to cut was scrubby, mostly burr oaks, making only one cut of posts to the tree, cumbering the ground, and that the cutting of the same, except a few left for shade trees, which she intended and intends so to leave, would be, and was, an advantage to the land and an increase to its value, by giving the grass a better chance to grow and making better pastures; that where the trees were being cut off, the land was well adapted for pasture, and was equally valuable as such as tillable land; that prudent and economical farmers on adjacent and adjoining lands were giving away equally good and better timber to those who would take it off; that she was not committing or suffering any waste, but simply making the land more valuable.

CASSODAY, J. For the purposes of this case, the widow may be regarded as the life tenant of the lands in question. In some states where wild land is connected with and included in the lands assigned to the widow as dower, she is only entitled to cut such wood and timber as may be necessary for the supply of the dower estate, to be actually used and consumed thereon, or for purposes connected with the proper occupation and enjoyment thereof. *White v. Willis*, 7 Pick. 143; *White v. Cutler*, 17 Pick. 248; *Miller v. Shields*, 55 Ind. 71; *Cannon v. Barry*, 59 Miss. 289; *Parkins v. Coxe*, 2 Hayw. 339. It has been substantially held in many states, and we are inclined to hold the rule to be substantially correct, that it is not waste for the life tenant to cut down wood or timber, so as to fit the land for cultivation or pasture, provided this does not damage or diminish the value of the inheritance, and is conformable to the rules of good husbandry; and this is so, even where the wood or timber so cut is sold, used, or consumed off the premises. *Keeler v. Eastman*, 11 Vt. 293; *Alexander v. Fisher*, 7 Ala. (N.S.) 514; *Hastings v. Crunkleton*, 3 Yeates 261; *Givens v. McCalmont*, 4 Watts 460; *Williard v. Williard*, 56 Pa. St. 119; *Drown v. Smith*, 52 Me. 141; *Davis v. Gilliam*, 5 Ired. Eq. 308; *Owen v. Hyde*, 6 Yerg. 334; *Findlay v. Smith*, 6 Munf. 148; *Appeal of Campbell*, 2 Doug. (Mich.) 141; *Jackson v. Brownson*, 7 Johns. 227; *Van Deusen v. Young*, 29 N.Y. 30; *Allen v. McCoy*, 8 Ohio 418; *Crockett v. Crockett*, 2 Ohio St. 180; *Schnebly v. Schnebly*,

26 Ill. 116. In some of these cases the question of waste depended somewhat on the proportion of woodland to the cultivated land. *Owen v. Hyde, supra*; *Findlay v. Smith, supra*; *Drown v. Smith, supra*; *Hastings v. Crunckleton, supra*. So it has been held that she may cut and sell timber sufficient to raise the amount of money necessary to pay the taxes already due upon the land. *Crockett v. Crockett, supra*.

Counsel concede that the widow had the right to cut timber from the land, if she had done so with the *bona fide* purpose of clearing off the same for cultivation or pasture, in case it was fitted for that purpose, and such use of it would be for the best interest of the remainder-man as well as the life tenant; but claims that she had no right to cut the same merely for the purpose of selling the posts for the money which they would bring. The defendant testified, in effect (and in that she was corroborated by the person who did the cutting), and her testimony in this respect is not contradicted, that her object in cutting the timber was to clear up and improve the place and make the pasture better, and hence more beneficial to her; that she did not clear it all off as she went along, because she was stopped; that she would have done so if she had not been stopped; that her intention was to thin out the trees, let in the sun, and make the pasture better, and that she so instructed the man who did the cutting. The court found, in effect, such to be her intention. There is evidence to the effect that, had this intention been carried out, it would have improved the use and value of the land, and the court substantially so found. We do not feel warranted in disturbing these findings.

Of course, she had no right to injure or depreciate the value of the inheritance, for that belonged to the remainder-men. *Robinson v. Kime*, 70 N.Y. 151. But the question whether she had so injured or diminished the use and value of the inheritance was not to be determined by the condition of the property at the precise moment when she was stopped by the injunction, but rather by the condition it would have been in had she been permitted to carry her manifest purpose into execution. The real question was whether in view of the character and condition of the land, the amount of plow, pasture, and wood land, and all the circumstances, it was good husbandry to make pasture of the land where the timber in question was cut. Upon this question the evidence was conflicting, but we are inclined to think the trial judge was justified in holding as he did. If it was good husbandry to take off the timber so as to improve the land for pasture, then the remainder-men are in no condition to complain because she sold \$35 or \$50 worth of posts, instead of burning up all that was cut from the land.

NOTE. — See, *accord*, *Dawson v. Coffman*, 28 Ind. 220; *Cannon*

v. *Barry*, 59 Miss. 289, 303; *Disher v. Disher*, 45 Neb. 100; *King v. Miller*, 99 N.C. 583; *Keeler v. Eastman*, 11 Vt. 293.  
Cf. *Clark v. Holden*, 7 Gray (Mass.) 8.

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### HARROW SCHOOL v. ALDERTON.

2 B. & P. 86. 1800.

THIS was an action of waste on the Statute of Gloucester, for ploughing up three closes of meadow-land, and converting the same into garden-ground, and building thereupon, to the damage of the plaintiff of 500*l*. Plea, Not guilty.

The cause was tried before HEATH, J., at the Westminster sittings after last Trinity Term, when the jury found a verdict for the plaintiff with three farthings damages, being one farthing for each close.

In the Michaelmas Term following, Cockell, Serjt., obtained a rule, calling on the plaintiff to shew cause why the judgment should not be entered up for the defendant, on account of the smallness of the damages recovered, on the principle that *de minimis non curat lex*; and cited in support of the application Bro. Abr. tit. Waste, pl. 123. Co. Lit. 54 a. 2 Inst. 306. Cro. Car. 414, 452. Finch's Law, lib. 1, cap. 3, s. 34, adopted 3 Black. Com. 228. Vin. Abr. tit. Waste N. and Buller's N.P. 120.

Lord ELDON, Ch.J. I confess that, when this application was first made, I was not aware that under the circumstances of the case the defendant was entitled to demand judgment; but my Brother HEATH has satisfied me that the application is supported by the current of authorities. I do not, indeed, see precisely on what ground those decisions have proceeded; though I can easily conceive many cases in which it may be extremely unconscientious for a plaintiff to take advantage of his judgment, where such small damages have been recovered as in this case. As, if the owner of land suffer his tenant to lay out money upon the premises, and then bring an action of waste to recover possession when the land may have been improved to ten times the original value. The cases do not appear to authorize the distinction contended for by my Brother SHEPHERD. Whether the waste committed be by alteration of the property, or by deterioration, still the jury, in estimating the damages, take into consideration the injury which the plaintiff has sustained; and in this case the jury have estimated the damage which these plaintiffs have sustained, by the alteration of their property, at three farthings only. The courts of common law seem to have entertained a sort of equitable jurisdiction in cases of this kind.

HEATH, J. This doctrine prevailed as early as the time of Bracton, who wrote before the Statute of Gloucester. With respect to the

distinction taken, there is no reason why pecuniary damages should not be assessed for the alteration of property as well as for the deterioration. Thus, if a tenant convert a furzebrake in which game have bred into arable or pasture, by which its real value would be improved, but its value to the landlord depreciated, it would be the business of the jury to assess damages to the landlord thereon.

ROOKE, J. I am of the same opinion.

*Rule absolute.*

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CLEMENCE v. STEERE.

1 R.I. 272. 1850.

**ACTION of waste.** The reversioner complained because the life tenant had converted meadow land into pasture land.

GREENE, C.J. The defendant is charged with having converted meadow land into pasture land. In England this would be waste. But we are not to apply the English law too strictly. Our lands are in many respects cultivated differently from land in England; and this difference is to be taken into account. Here it is necessary to show that the change is detrimental to the inheritance and contrary to the ordinary course of good husbandry. If in this case the change injured the farm, or was such a change as no good farmer would make, it was waste.

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SMYTH v. CARTER.

18 Beav. 78. 1853.

IN 1852, the defendant became owner of a public-house and premises which had formerly been built on part of the waste of Bedminster, of which the plaintiffs were the lords of the manor. Rent had been paid by the previous owners to the plaintiffs.

The plaintiffs alleged, that the defendant was pulling down the house, in order to erect a brewery in its place, which, as it would overlook the plaintiffs' residence, would form an intolerable nuisance. In July last, the plaintiffs obtained an injunction to restrain the defendant from so doing, and the defendant now moved to dissolve it.

Mr. Roupell and Mr. C. M. Roupell, in support of the motion, contended, first, that there was no evidence of the defendant's intention to erect a brewery; and that, from the ruinous state of the premises, the defendant's alterations and outlay would, at the utmost, be "meliorating waste," which, far from injuring the plaintiffs, would be for their benefit.



THE MASTER OF THE ROLLS. Assuming the plaintiffs to be landlords, and the defendant tenant, I entertain no doubt that this court will restrain a tenant from pulling down a house and building any other which the landlord dislikes. It is not sufficient to show that the house proposed to be built is a better one; and the fact of the defendant's showing that the landlord does not know his own interest will not affect the judgment of the court in any respect whatever. The landlord has a right to exercise his own judgment and caprice, whether there shall be any change; and if he objects, the court will not allow a tenant to pull down one house and build another in its place.

NOTE. — See *Klie v. Von Broock*, 56 N.J. Eq. 18, 27; *Jackson v. Andrew*, 18 Johns. (N.Y.) 431; *Davenport v. Magoon*, 13 Or. 3; *Dooly v. Stringham*, 4 Utah 107; *Brock v. Dole*, 66 Wis. 142.

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### MELMS v. PABST BREWING COMPANY.

104 Wis. 7. 1899.

APPEAL from a judgment of the Circuit Court for Milwaukee County: GEORGE CLEMENTSON, Judge. *Affirmed*.

This is an action for waste, brought by reversioners against the defendant, which is the owner of an estate for the life of another in a quarter of an acre of land in the city of Milwaukee. The waste claimed is the destruction of a dwelling-house upon the land, and the grading of the same down to the level of the street. The complaint demands double damages, under sec. 3176, Stats. 1898.

The quarter of an acre of land in question is situated upon Virginia Street, in the city of Milwaukee, and was the homestead of one Charles T. Melms, deceased. The house thereon was a large brick building built by Melms in the year 1864, and cost more than \$20,000. At the time of the building of the house, Melms owned the adjoining real estate, and also owned a brewery upon a part of the premises. Charles T. Melms died in the year 1869, leaving his estate involved in financial difficulties. After his decease, both the brewery and the homestead were sold and conveyed to the Pabst Brewing Company, but it was held in the action of *Melms v. Pabst B. Co.*, 93 Wis. 140, that the brewing company only acquired Mrs. Melms's life estate in the homestead, and that the plaintiffs' in this action were the owners of the fee, subject to such life estate. As to the brewery property, it was held in an action under the same title, decided at the same time, and reported in 93 Wis. 153, that the brewing company acquired the full title in fee. The homestead consists of a piece of land ninety feet square, in the center of which the aforesaid

dwelling-house stood; and this parcel is connected with Virginia Street on the south by a strip forty-five feet wide and sixty feet long, making an exact quarter of an acre.

It clearly appears by the evidence that after the purchase of this land by the brewing company the general character of real estate upon Virginia Street about the homestead rapidly changed, so that soon after the year 1890 it became wholly undesirable and unprofitable as residence property. Factories and railway tracks increased in the vicinity, and the balance of the property was built up with brewing buildings, until the quarter of an acre homestead in question became an isolated lot and building, standing from twenty to thirty feet above the level of the street, the balance of the property having been graded down in order to fit it for business purposes. The evidence shows without material dispute that, owing to these circumstances, the residence, which was at one time a handsome and desirable one, became of no practical value, and would not rent for enough to pay the taxes and insurance thereon; whereas, if the property were cut down to the level of the street, so as to be capable of being used as business property, it would again be useful, and its value would be largely enhanced. Under these circumstances, and prior to the judgment in the former action, the defendant removed the building and graded down the property to about the level of the street, and these are the acts which it is claimed constitute waste.

The action was tried before the court without a jury, and the court found, in addition to the facts above stated, that the removal of the building and grading down of the earth was done by the defendant in 1891 and 1892, believing itself to be the owner in fee simple of the property, and that by said acts the estate of the plaintiffs in the property was substantially increased, and that the plaintiffs have been in no way injured thereby. Upon these findings the complaint was dismissed, and the plaintiffs appeal.

WINSLOW, J. Our statutes recognize waste, and provide a remedy by action and the recovery of double damages therefor (Stats. 1898, sec. 3170 *et seq.*); but they do not define it. It may be either voluntary or permissive, and may be of houses, gardens, orchards, lands, or woods (Id. sec. 3171); but, in order to ascertain whether a given act constitutes waste or not, recourse must be had to the common law as expounded by the text-books and decisions. In the present case a large dwelling-house, expensive when constructed, has been destroyed, and the ground has been graded down, by the owner of the life estate, in order to make the property serve business purposes. That these acts would constitute waste under ordinary circumstances cannot be doubted. It is not necessary to delve deeply into the Year Books, or philosophize extensively as to the meaning of early judicial utterances, in order to arrive at this conclusion. The following

definition of waste was approved by this court in *Bandlow v. Thieme*, 53 Wis. 57: "It may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title." In the same case it was also said: "The damage being to the inheritance, and the heir or the reversioner having the right of action to recover it, imply that the injury must be of a lasting and permanent character." And in *Brock v. Dole*, 66 Wis. 142, it was also said that "any material change in the nature and character of the buildings made by the tenants is waste, although the value of the property should be enhanced by the alteration."

These recent judicial utterances in this court settle the general rules which govern waste, without difficulty, and it may be said, also, that these rules are in accord with the general current of the authorities elsewhere. But, while they are correct as general expressions of the law upon the subject, and were properly applicable to the cases under consideration, it must be remembered that they are general rules only, and, like most general propositions, are not to be accepted without limitation or reserve under any and all circumstances. Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate. *Bewes, Waste*, 134 *et seq.*, and cases cited. Again, and in accordance with this same principle, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England; and it is now well settled that, while such change may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance than injures it. *Doherty v. Allman*, 3 App. Cas. 709; *In re McIntosh*, 61 Law J. Q.B. 164. Following the same general line of reasoning, it was early held in the United States that, while the English doctrine as to waste was a part of our common law, still the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, was not waste, although such acts would clearly have been waste in England. *Tiedeman, Real Prop.* (2d ed.), § 74; *Rice, Mod. Law Real Prop.* §§ 160, 161; *Wilkinson v. Wilkinson*, 59 Wis. 557.

These familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code, which was crystallized for all time in the days of feudal ten-

ures, but that it is subject to such reasonable modifications as may be demanded by the growth of civilization and varying conditions. And so it is now laid down that the same act may be waste in one part of the country while in another it is a legitimate use of the land, and that the usages and customs of each community enter largely into the settlement of the question. Tiedeman, Real Prop. (2d ed.), § 73. This is entirely consistent with, and in fact springs from, the central idea upon which the disability of waste is now, and always has been, founded, namely, the preservation of the property for the benefit of the owner of the future estate without *permanent* injury to it. This element will be found in all the definitions of waste, namely, that it must be an act resulting in permanent injury to the inheritance or future estate. It has been frequently said that this injury may consist either in diminishing the value of the inheritance, or increasing its burdens, or in destroying the identity of the property, or impairing the evidence of title. The last element of injury so enumerated, while a cogent and persuasive one in former times, has lost most, if not all, of its force at the present time. It was important when titles were not registered, and descriptions of land were frequently dependent upon natural monuments or the uses to which the land was put; but since the universal adoption of accurate surveys and the establishment of the system of recording conveyances, there can be few acts which will impair any evidence of title. *Doherty v. Allman*, 3 App. Cas. 709; *Bewes, Waste*, 129, 130, *et seq.* But the principle that the reversioner or remainderman is ordinarily entitled to receive the identical estate, or, in other words, that the identity of the property is not to be destroyed, still remains, and it has been said that changes in the nature of buildings, though enhancing the value of the property, will constitute waste if they change the identity of the estate. *Brock v. Dole*, 66 Wis. 142. This principle was enforced in the last-named case, where it was held that a tenant from year to year of a room in a frame building would be enjoined from constructing a chimney in the building against the objection of his landlord. The importance of this rule to the landlord or owner of the future estate cannot be denied. Especially is it valuable and essential to the protection of a landlord who rents his premises for a short time. He has fitted his premises for certain uses. He leases them for such uses, and he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it might be found of greater value by reason of the change. Many cases will be found sustaining this rule; and that it is a wholesome rule of law, operating to prevent lawless acts on the part of tenants, cannot be doubted, nor is it intended to depart therefrom in this decision. The case now before us, however, bears little likeness to such a case, and contains elements

so radically different from those present in *Brock v. Dole*, 66 Wis. 142, that we cannot regard that case as controlling this one.

There are no contract relations in the present case. The defendants are the grantees of a life estate, and their rights may continue for a number of years. The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by and preserve the useless dwelling-house, so that he may at some future time turn it over to the reversioner, equally useless? Certainly, all the analogies are to the contrary. As we have before seen, the cutting of timber, which in England was considered waste, has become in this country an act which may be waste or not, according to the surrounding conditions and the rules of good husbandry; and the same rule applies to the change of a meadow to arable land. The changes of conditions which justify these departures from early inflexible rules are no more marked nor complete than is the change of conditions which destroys the value of residence property as such and renders it only useful for business purposes. Suppose the house in question had been so situated that it could have been remodeled into business property; would any court of equity have enjoined such remodeling under the circumstances here shown, or ought any court to render a judgment for damages for such an act? Clearly, we think, not. Again, suppose an orchard to have become permanently unproductive through disease or death of the trees, and the land to have become far more valuable, by reason of new conditions, as a vegetable garden or wheat field, is the life tenant to be compelled to preserve or renew the useless orchard, and forego the advantages to be derived from a different use? Or suppose a farm to have become absolutely unprofitable, by reason of change of market conditions, as a grain farm, but very valuable as a tobacco plantation, would it be waste for the life tenant to change the use accordingly, and remodel a now useless barn or granary into a tobacco shed? All these questions naturally suggest their own answer, and it is certainly difficult to see why, if change of conditions is so potent in the case of timber, orchards, or kind of crops, it should be of no effect in the case of buildings similarly affected.

It is certainly true that a case involving so complete a change of situation as regards buildings has been rarely, if ever, presented to the courts, yet we are not without authorities approaching very nearly to the case before us. Thus, in the case of *Doherty v. Allman*, 3 App. Cas. 709, before cited, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling-houses, on the ground that by change of conditions the demand for storehouses had ceased and the property had become worthless, whereas it would be productive when fitted for dwelling-houses. Again, in the case of *Sherrill v. Connor*, 107 N.C. 630, which was an action for permissive waste against a tenant in dower, who had permitted large barns and outbuildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the Civil War to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to fall into decay, rather than incur the cost of repair. This last case is very persuasive and well reasoned, and it well states the principle which we think is equally applicable to the case before us. In the absence of any contract, express or implied, to use the property for a specified purpose, or to return it in the same condition in which it was received, a radical and permanent change of surrounding conditions, such as is presented in the case before us, must always be an important, and sometimes a controlling, consideration upon the question whether a physical change in the use of the buildings constitutes waste.

In the present case this consideration was regarded by the trial court as controlling, and we are satisfied that this is the right view. This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper in-

structions, or for the court where, as in the present case, the question is tried by the court.

By THE COURT. Judgment affirmed.

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CHALMERS v. SMITH.

152 Mass. 561. 1891.

THE plaintiffs purchased the land on which the barn mentioned in the declaration stood on July 19, 1887. The defendants, as co-partners, occupied the barn under an oral lease from the former owners at the time of the purchase, and continued in occupation under that lease until its term expired, July 1, 1888. In June, 1888, the defendants, by an oral bargain, hired the barn of the plaintiffs for another year from July 1, 1888, at a rent of seventy-five dollars. On the morning of July 31, 1888, the barn fell, its floors settling and many of its beams being broken. The plaintiffs contended and offered evidence tending to show that the barn fell from overloading, and that the weight put into it by the defendants was excessive, and improperly distributed. But the defendants denied this, and contended and offered evidence tending to show that the accident was caused by the defective construction of the barn. It also appeared in evidence, that the defendants remained in occupation of the barn until July 1, 1889, and that they had paid the rent for the full term before this action was brought.

When the plaintiffs rested their case, the defendants moved for a verdict, on the ground that the action could not be maintained upon the pleadings and evidence, but the judge overruled the motion; and the defendants excepted.

The judge submitted the case to the jury upon instructions, to which no exception was taken, which allowed them to find for the plaintiffs, if they found in fact that the fall of the barn was caused by an apparently unreasonable use of it by the defendants.

If the case was properly submitted to the jury, judgment was to be entered for the plaintiffs; otherwise, such disposition of the case was to be made as might be proper.

KNOWLTON, J. The jury have found that the defendants unreasonably used the plaintiffs' barn by putting into it a weight which was apparently, and in fact, excessive. This was something more than a mere omission which would constitute permissive waste. It was a positive, unreasonable act, of a kind likely to cause injury to the plaintiffs' property. Such an act, which results in damage, is voluntary waste on the part of a tenant who is guilty of it.

A tenant at will who commits voluntary waste is liable to his landlord in an action of trespass *quare clausum*. His act terminates his

right as a tenant, and entitles the landlord to treat him as a trespasser in doing it. *Starr v. Jackson*, 11 Mass. 519; *Lienow v. Ritchie*, 8 Pick. 235; *Daniels v. Pond*, 21 Pick. 367; *Lothrop v. Thayer*, 138 Mass. 466, 473.

A tenant at will as well as a tenant for life or for years is under an implied agreement to use the premises in a tenant-like manner, and not by his voluntary act unnecessarily to injure them. While this agreement does not include an obligation on the part of a tenant at will to repair defects resulting from the action of the elements, or from a reasonable use of the premises, or from an unavoidable accident, it creates a liability in an action of contract for a wrongful act in violation of it. 1 Add. Cont. (8th ed.) 383. *Holford v. Dunnett*, 7 M. & W. 348; *United States v. Bostwick*, 94 U.S. 53, 66.

*Judgment for the plaintiffs.*

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### MOORE v. TOWNSHEND.

33 N.J. L. 284. 1869.

THIS was an action on the case in the nature of waste, to recover damages for permissive waste, tried at the Cumberland Circuit. The plaintiff, on the 5th of November, 1853, by a lease, under seal, demised to the defendant the premises known as The Eagle Glass Works, in the county of Cumberland, together with one hundred and fifty moulds, and all the tools of every description connected with the glass manufacturing business at that manufactory; to hold for the term of two years and eight months, at a yearly rent of one thousand dollars. The lease contained a covenant, by the tenant, for the re-delivery of the moulds and tools to the lessor, at the expiration of the term, in as good condition as they were in at the time of the demise, reasonable wear and tear and fire excepted. It also contained the following clause: "It being understood and agreed between the said parties that said Moore has the privilege of laying out one hundred dollars per year in repairs on said property, and deducting the same from the rent." There was no other covenant in the lease on the subject of repairs. It was shown, at the trial, that twenty-one dollars and fifty cents had been expended in repairs during the continuance of the lease, of which sum six dollars and ninety-five cents had been deducted from the rent, the balance of which had been paid.

The jury found a verdict for the plaintiff, and assessed his damages at five hundred and fifty dollars.

A rule to show cause why a new trial should not be granted, was allowed; and the following reasons were assigned for setting aside the verdict: 1. Because an action on the case will not lie against a



tenant for years for permissive waste. 2. Because the lease between the parties measures and limits the liability of the tenant, in the matter of repairs.

DEPUE, J. The action on the case, in the nature of waste, has almost entirely superseded the common law action of waste, as well for permissive as for voluntary waste, as furnishing a more easy and expeditious remedy than a writ of waste. It is also an action encouraged by the courts, the recovery being confined to single damages, and not being accompanied by a forfeiture of the place wasted.

At common law, waste lay against a tenant in dower, tenant by the curtesy and guardian in chivalry, but not against lessees for life or years. 2 Inst. 299, 305; Co. Litt. 54. The reason of this diversity was, that the estates and interests of the former were created by the law, and therefore the law gave a remedy against them, but the latter came in by the act of the owner who might have provided in his demise against the doing of waste by his lessee, and if he did not, it was his negligence and default. 2 Inst. 299; Doct. & Stu., ch. 1, p. 102. This doctrine was found extremely inconvenient, as tenants took advantage of the ignorance of their landlords, and committed acts of waste with impunity. To remedy this inconvenience the statute of Marlbridge (52 Hen. 3, ch. 23) was passed. But as the recompense given by this statute was frequently inadequate to the loss sustained, the statute of Gloucester (6 Edw. 1, ch. 5) increased the punishment by enacting that the place wasted should be recovered, together with treble damages. 1 Cruise Dig. 119, § 25, 26; *Sackett v. Sackett*, 8 Pick. p. 313, per PARKER, C.J. The statute of Marlbridge is in the following words: "Also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do and thereof be convict, they shall yield full damage, and shall be punished by amercement grievously." 2 Inst. 145. The word *fermor* (*firmarii*) in this statute comprehended all such as held by lease for life or lives, or for years, by deed or without deed; 2 Inst. 145, note 1; and also devisees for life or years. 2 Roll. Abr. 826, l. 35. By the statute of Gloucester, "it is provided, also, that a man, from henceforth, shall have a writ of waste, in the Chancery, against him that holdeth by law of England or otherwise, for term of life, or for term of years, or a woman in dower. And he which shall be attainted of waste, shall lose the thing that he hath wasted, and, moreover, shall recompence thrice so much as the waste shall be taxed at. And for waste made in the time of wardship, it shall be done as is contained in the great charter." 2 Inst. 299. At the common law, a tenant at will was punishable for voluntary waste, but not for permissive waste. *Countess of*

*Salop v. Crompton*, Cro. Eliz. 777, 784. *The Countess of Shrewsbury's Case*, 5 Coke 24; *Harnett and Wife v. Maitland*, 16 M. & W. 258. Tenants in dower, by the curtesy, for life or lives, and for years, were included in the statute of Gloucester. Tenants at will were always considered as omitted from the statute of Marlbridge as well as from the statute of Gloucester, and, therefore, continued to be dispunishable for mere permissive waste, and punishable for voluntary waste by action of trespass as at common law. The reason of this exemption of tenants at will from liability for permissive waste, was the uncertain nature of their tenure which would make it a hardship to compel them to go to any expense for repairs. Their exemption from the highly remedial process of waste provided by the statute of Gloucester, is attributable to the fact that the owner of the inheritance might at any time, by entry, determine the estate of the tenant, and thus protect the inheritance from spoil or destruction.

The language of the statute of Marlbridge is, "shall not make (*non facient*) waste," and in the statute of Gloucester, in speaking of guardians, the words used are, "he which did waste" (*que avera fait waste*). The settled construction of these statutes in the English law until a comparatively recent period was, that they included permissive waste as well as voluntary waste. In a note in exposition of the statute of Marlbridge, Lord Coke, in commenting on the words "*non facient*," says: "To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of omission or not doing as for want of reparation, as waste by reason of commission, as to cut down timber, trees, or prostrate houses, or the like; and the same word hath the statute of Gloucester, ch. 5, *que avera fait waste*, and yet is understood as well of passive as active waste, for he that suffereth a house to decay which he ought to repair, doth the waste." 2 Inst. 145; 7 Bac. Abr. 250; 3 Bl. Com. 225; 2 Saund. 252; 4 Kent 76. So under the prohibition to do waste, the tenant is held to be bounden for the waste of a stranger, though he assented not to the doing of waste. Doct. & Stu., ch. 4, p. 113; 2 Inst. 303; *Fay v. Brewer*, 3 Pick. 203; 1 Washburn R. Prop. 116. It is common learning that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease by whomsoever it may be committed, per HEATH, J., in *Attersoll v. Stevens*, 1 Taunt. 198; with the exception of the acts of God, public enemies, and the acts of the lessor himself. *White v. Wagner*, 4 Harr. & Johns. 373; 4 Kent 77; *Heydon and Smith's Case*, 13 Coke 69. The instances in the earlier reports in which lessees for life or years were held liable for permissive waste, which consisted in injuries resulting from acts of negligence or omission, are quite frequent; and their liability is grounded, not on the covenants or agreements in the instruments of demise, but on the

statute, which subjected them to the action of waste. *Griffith's Case*, Moore 69, No. 187; *Ib.* 62, No. 173; *Ib.* 73, No. 200; Keilway 206; *Darcy v. Askwith*, Hobart, 234; *Glover v. Pipe*, Owen 92; 3 Dyer 281; 2 Roll. Abr. 816, l. 40; 22 Vin. Abr. Waste, "c" and "d," pp. 436-440, 443; Co. Litt. 52 a, 53 b; 5 Com. Dig. Waste, d 2, d 4; Bissett on Estates, 299, 300. So uniformly had the courts determined that lessees for life or years had committed waste by the application of the common law rules, with respect to waste, whether of omission or commission, that the learned commentator on English law says, "that for above five hundred years past, all tenants merely for life, or for any less estate, have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste." 2 Bl. Com. 283.

This construction of the statutes of Marlbridge and Gloucester continued to be received without dissent until the decision of the case of *Gibson v. Wells*, 4 B. & P. 290, in the year 1805, which was followed by the case of *Herne v. Bembow*, 4 Taunt. 764 (1813). These cases it is insisted have settled the construction against the liability of a tenant for years for permissive waste. *Gibson v. Wells* is not an authority for this position. The tenant against whom the action there was brought was a tenant at will, who is not included within the statutes, and who, at common law, was punishable for voluntary, but not for permissive waste. In *Herne v. Bembow*, it does not clearly appear that the lease was for a term. It is certain that the opinion of the court proceeded upon the principles applicable to tenants at will. As the case is reported in Taunton, it appears to have been decided, without argument or consideration. The opinion is a *per curiam* opinion, and the only case cited is the *Countess of Shrewsbury's Case*, 5 Co. 24, which was a case of a tenancy at will.

The only subsequent case which sustains these cases is *Torriano v. Young*, 6 C. & P. 8; a case at *nisi prius*. In other cases where *Herne v. Bembow* was cited, the English courts show no disposition to follow it. In *Jones v. Hill*, 7 Taunt. 392, GIBBS, C.J., expressly guards himself against being supposed to concur in the position that an action will not lie against a lessee for years for permissive waste. In *Martin v. Gilham*, 7 A. & E. 540, and in *Beale v. Sanders*, 3 Bing. N.C. 850, a decision of that question is avoided; and in *Harnett v. Mailland*, 16 M. & W. 256, 261, PARKE, B., on *Gibson v. Wells*, *Herne v. Bembow*, and *Torriano v. Young* being cited, intimates an opinion against those cases as necessarily involving the result that a tenant for life is also punishable for permissive waste. Text writers of acknowledged authority have not recognized these cases as settling the law against the older cases and the opinions of Coke and Blackstone, but have regarded them as merely throwing a doubt

upon a principle that had previously been set at rest. 2 Saund. 252 b, note i; Arch. L. & T. 196, 7; Smith on L. & T. 196; Comyn on L. & T. 495, and note e; 2 Bouvier's Law Dict. 645, Waste, § 14; 1 Washburn on R. Prop. 124, and note 1. By other legal writers they are doubted or condemned as unsound in principle. Roscoe on Real Actions 385; Ferrard on Fixtures 278, 281, note; 1 Evans' Statutes 193, note; Broom on Parties 257; 4 Kent 76, 79; Elmes on Dilapidations 257.

Independent of authority, the true construction of the statute of Gloucester leads to the conclusion that tenant for life or years was made liable for permissive as well as voluntary waste. Before either this act or the statute of Marlbridge was passed, waste was recognized in the law, as an injury to the inheritance, resulting either from acts of commission or of omission. Neither of these statutes created new kinds of waste, but gave a new remedy for old wastes, leaving what was waste, and what not, to be determined by the common law; 2 Inst. 300; and by the statute of Gloucester the writ of waste was suable out of chancery as well against lessee for life or years, as against tenant by the curtesy, or in dower, putting the former, as to the newly created remedy, on the same footing as the latter. "It hath been used as an ancient maxim in the law, that tenant by the curtesy, and the tenant in dower, should take the land with this charge, that is to say, that they should do no waste themselves, nor suffer none to be done; and when an action of waste was given after, against a tenant for term of life, then he was taken to be in the same case, as to the point of waste as tenant by the curtesy, and tenant in dower was, that is to say, that he should do no waste, nor suffer none to be done." Doct. & Stu., ch. 4, p. 113. No distinction can be made between lessee for life and lessee for years. Both are mentioned in the statute conjointly; and each derives his interest in the premises from the act of the owner of the inheritance.

The second section of the act for the prevention of waste, which is in force in this state (Nix. Dig., 4th ed., 1022), provides that no tenant for life or years, or for any other term, shall during the term *make or suffer* any waste, sale or destruction of houses, gardens, orchards, lands, or woods, or anything belonging to the tenements demised, without special license in writing, making mention that he may do it. The third section is in substance the same as the statute of Gloucester. The act was passed in 1795. The use of the words "*make or suffer*," in the second section, which are equivalent to Coke's interpretation of *facient* in the statute of Marlbridge, manifests an intent to adopt as the law of this state the doctrine of the English courts, as to the liability of tenants for life or years for permissive waste, which was universally received at the time of the passage of the act.

The second reason assigned involves the effect of the lease in this action.

Premising that the act or omission, to constitute waste must be either an invasion of the lord's property, or at least be some act or neglect which tends, materially, to deteriorate the tenement, or to destroy the evidence of its identity; (Burton's Comp. R. Prop. 411; *Doe ex dem. Grubb v. Earl of Burlington*, 5 B. & Ad. 507; 2 Saund. 259 a, note o; *Pyncheon v. Stearns*, 11 Met. 304; 1 Washburn R. Prop. 108;) and that the action is founded partly upon the common law and partly upon the statute, and does not depend for its support on any covenants of the tenant; (22 Vin. Abr. 457, Waste M. 4; 3 Bl. Com. 227; *Kinlaysia v. Thornton*, 2 W. Black. 1111; *Marker v. Kenrick*, 13 C. B. 188;) it is obvious that we must resort to the statute for the conditions on which the tenant is excusable for the waste done.

There is a class of cases in which tenants have been held not to be liable for waste resulting from non-repair where the lessor has entered into a covenant to make the repairs for the want of which the injury has happened. These cases go upon the ground that the injury was caused by the lessor's own default, on which he can base no right to recover. There is no such covenant in the lease now under consideration.

The statute forbids waste by the tenant "without special license, in writing, making mention that he may do it." The consent of the landlord by parol will not be sufficient authority. *McGregor v. Brown*, 6 Seld. 114. The words usually employed for this purpose are "without impeachment of waste," but any words of equivalent import will be sufficient, provided they amount to a license to do the acts. The defendant, to bring himself within the statute, relies on that part of the lease which relates to the re-delivery of the personal property leased, in connection with the stipulation giving the defendant the privilege of expending a portion of the rent in each year for repairs. The covenant as to the personal property is entirely distinct from the obligations of the tenant, with respect to the real estate. The privilege of expending a portion of the rent reserved in repairs is not a license to the tenant to omit a duty put upon him by the statute, growing out of the relations between the parties. To construe a privilege given by the landlord to expend his money in the reparation of the demised premises, as a license to the tenant to omit his duty, to the spoil or destruction of the inheritance, would be an entire subversion of the obvious intent of the landlord. If it falls short of a license for the act complained of, it does qualify or abridge the obligations of the tenant which exist independent of the provisions of the lease.

It was further insisted that if any action lies, it should be an action *ex contractu*, and not in *tort*. As already observed, the gravamen of the action is the breach of a statutory duty. An action on the case founded in *tort* will lie for the breach of a duty, though it be such as

that the law will imply a promise on which an action *ex contractu* may be maintained. *Brunell v. Lynch*, 5 B. & C. 589. To the same effect are the cases of *Kinlyside v. Thornton* and *Marker v. Kenrick*, already cited, in which it was held that an action on the case in the nature of waste will lie, although the act complained of might also be the subject of an action for the breach of an express covenant.

*Rule discharged.*

NOTE. — See, *accord*, *Suydam v. Jackson*, 54 N.Y. 450; *Harnett v. Mailland*, 16 M. & W. 257; *Davies v. Davies*, L.R. 38 Ch.D. 499.

The courts said that a tenant for life is liable for permissive waste in *Miller v. Shields*, 55 Ind. 71, 77; *Wilson v. Edmonds*, 24 N.H. 517, 545; *Schulting v. Schulting*, 41 N.J. Eq. 130, 132; *Stevens v. Rose*, 69 Mich. 259; *Sperrill v. Connor*, 107 N.C. 630, 636; *Harvey v. Harvey*, 41 Vt. 373. See, *contra*, *In re Cartwright*, L.R. 41 Ch.D. 532.

A tenant from year to year was held liable for permissive waste in *Newbold v. Brown*, 44 N.J. L. 266. In *Long v. Fitzimmons*, 1 W. & S. (Pa.) 530, it was held that "if nothing is said in the lease about it, the tenant is bound to keep the premises in repair." The tenancy was, apparently, a tenancy from year to year.

## THE COUNTESS OF SHREWSBURY'S CASE.

5 Co. 24. 1600.

THE Countess of Shrewsbury brought an action on the case against Richard Crompton, a lawyer of the Temple, and declared, that she leased to him a house at will, *et quod ille tam negligenter et improvide custodivit ignem suum, quod domus illa combusta fuit*: to which the defendant pleaded not guilty, and was found guilty, etc. And it was adjudged that for this permissive waste no action lay, against the opinion of Brook in the abridgment of the case of 48 E. 3, 25. West. 52. And the reason of the judgment was, because at the common law no remedy lay for waste, either voluntary or permissive against lessee for life or years, because the lessee had interest in the land by the act of the lessor, and it was his folly to make such lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So and for the same reason, a tenant at will shall not be punished for permissive waste. But the opinion of Littleton is good law, fol. (15) 152. If lessee at will commits voluntary waste, *scil.* in abatement of the houses, or in cutting of the woods, there a general action of trespass lies against him. For as it is said in 2 and 3 Phil. & Mar. Dyer 122 b, when tenant at will takes upon him to do such things which none can do but the owner of the land, these

amount to the determination of the will, and of his possession, and the lessor shall have a general action of trespass without any entry: and there 15 E. 4, 20 b, is cited, that if a bailee of goods as of a horse, etc., kill them, the bailor shall have a general action of trespass, for by the killing the privity was determined. But it was agreed that in some cases, when there is a confidence reposed in the party, the action upon the case will lie for negligence, although the defendant comes to the possession by the act of the plaintiff. As 12 E. 4, 13 a, b, where a man delivers a horse to another to keep safe, the defendant *equum illum tam negligenter custodivit, quod ob defectum bonæ custodiæ interiit*; the action on the case lies for this breach of the trust. So 2 H. 7, 11, if my shepherd, whom I trust with my sheep, and by his negligence they be drowned, or otherwise perish, an action upon the case lies: but in the case at bar it was a lease at will made to the defendant, and no confidence reposed in him; wherefore it was awarded, that the plaintiff take nothing by her bill.

NOTE. — See, *accord*, *Lothrop v. Thayer*, 138 Mass. 466, 473. "The reasoning of the old cases is undoubtedly technical, but they were decided with full knowledge that an action lay for an injury to a personal chattel, caused by the negligent keeping of the bailee."

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EARLE v. ARBOGAST.

180 Pa. 409. 1897.

At the trial it appeared that the premises in question had been leased by the plaintiff to the defendants by parol for one year, with no agreement to repair or to deliver the premises in good order and condition at the end of the term. The property had been used by the lessor as a soap factory, and this use was continued by the defendants. The only new appliance which the defendants used was a rendering tank which exploded and caused the injuries for which suit was brought. It was claimed by the plaintiff that the explosion was caused by the vent pipe of the tank becoming clogged. It was also averred by him that the tank was not strong enough to withstand the pressure of steam that was put upon it.

OPINION BY MR. JUSTICE FELL. Generally in the absence of an express covenant on the subject the law implies a covenant on the part of the lessee so to treat the demised premises that they may revert to the lessor unimpaired except by usual wear and tear, and uninjured by any wilful or negligent act of the lessee. The implied covenant does not, however, extend to the loss of buildings by fire, flood or tempest, or enemies, which it was not in the power of the lessee to prevent, and there is no implied covenant that the lessee

shall restore buildings which have been destroyed by accident without fault on his part: Jackson and Gross' Landlord and Tenant, in Pennsylvania, secs. 964, 965; Taylor's Landlord and Tenant, sec. 343; Cooley on Torts, p. 335; *Long v. Fitzimmons*, 1 W. & S. 530; *United States v. Bostwick*, 94 U.S. 53.

Tenants by the curtesy and in dower were responsible at common law, and tenants for life and for years, whose estates were created by the acts of the parties, were responsible under statute as for permissive waste until relieved by the statute of 6 Anne, chap. 31, where the property was destroyed by unavoidable accident, not the act of God or the public enemy. The statute of 6 Anne, chap. 31, which relieved the tenant from liability for the consequences of accidental fires has never been in force in this state, and it has been formally adopted by few if any of the other states, except New Jersey. Chancellor Kent, 4 Kent's Com. 82, says: "Perhaps the universal silence of our courts upon the subject of any such responsibility of the tenant for accidental fires is presumptive evidence that the doctrine of permissive waste has never been introduced and carried to that extent in the common law jurisprudence of the United States." In *U.S. v. Bostwick*, *supra*, it was held that the implied covenant of the tenant is not to repair generally, but so to use the property as to make repairs unnecessary as far as possible, and that it is a covenant against voluntary waste only. It is said in the opinion by WAITE, C.J.: "It has never been so construed as to make a tenant answerable for accidental damages nor to bind him to rebuild if the buildings are burned down or otherwise destroyed by accident." The statement in the opinion in *Long v. Fitzimmons*, *supra*, that a tenant, where there is no covenant to that effect, is not bound to restore buildings that have been burned down or become ruinous by other accident without default on his part may be a dictum only, but it is in harmony with the trend of decisions of the courts of other states and of the federal courts, and it has been accepted and acted upon by the courts of this state, and it is a correct statement of the law.

There could be no recovery without proof of the defendants' negligence, and the burden of proof rested upon the plaintiff. The lease was in parol, for one year, with no agreement to repair or to deliver the premises in good order and condition at the end of the term. No new or different use was made of the building by the tenants. It was used by them for the purpose for which it had been leased, and for which it had been fitted with machinery and used by the lessor. The only new appliance used was the rendering tank which exploded. In the use of the property leased the defendants were under an implied duty not to negligently injure it. The standard of their duty was reasonable care. The mere fact of the explosion did not throw upon them the burden of proving that they were not negligent. The burden of proof was with the plaintiff throughout the



trial. He was not bound in the first instance to prove more than enough to raise a presumption of negligence on the part of the defendants. Proof of the explosion and of the attendant circumstances might have furnished sufficient ground for a reasonable inference of negligence to have made out a *prima facie* case, but he could not rest his case upon a bare presumption based only upon the fact that the explosion occurred.

NOTE. — A tenant is not answerable, merely because he is tenant, for the destruction of buildings on the land by accidental fires. *Wainscott v. Silvers*, 13 Ind. 497; *Levey v. Dyess*, 51 Miss. 501; *Sampson v. Grogan*, 21 R.I. 174; *Maggot v. Hansbarger*, 8 Leigh (Va.) 532; *U.S. v. Bostwick*, 94 U.S. 53.

See also *Machen v. Hooper*, 73 Md. 342, for a consideration of the question whether a tenant is liable for a loss not occasioned by his negligence.

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### WHITE v. WAGNER.

4 Har. & J. (Md.) 373. 1818.

ACTION of trespass on the case, in the nature of waste.

At the trial it was admitted that the defendant was tenant of the premises in question, as a dwelling-house, under the plaintiff, for a year, at the rent of \$350, and that no covenants or agreements were entered into by the parties relative to repairs of the premises, or other matters relating thereto, other than such as are implied by law, except merely the agreement to let the premises by the plaintiff to the defendant for a year, and by the defendant to pay the said rent. That the defendant entered into possession some time in the month of May, 1812, and continued therein until the 27th of June of the same year, when a large armed multitude of unknown persons, being residents of the city of Baltimore, or of this state, assembled and combined themselves together in the said city for the purpose of pulling down the said house, and compelling the defendant to desist from the distribution of a newspaper called *The Federal Republican*, and to drive the defendant from the said city. That the mayor of the city, the judges of the court of oyer and terminer and gaol delivery for Baltimore County, and other civil officers of the said city and county, being informed of this combination and assemblage of an armed multitude, and the purposes for which they were so assembled, did, by all such ways and means as they deemed best calculated, from the powers they possessed, endeavour to prevent and hinder the said multitude from perpetrating their unlawful and outrageous purposes as aforesaid; but in spite of all the efforts of the said civil offi-

cers, and by a power wholly incontrollable and irresistible by the said officers, or by the defendant, the said armed multitude did compel the defendant, and his family, for the safety of their lives, to fly from and abandon said house and premises, and from the said city, and did ruin, spoil, and destroy said house, in the manner as stated in the declaration. The plaintiff then offered evidence to prove, that after the defendant took possession of the said house, he used it for the purpose of receiving therein a newspaper called *The Federal Republican*, which was printed in George Town, in the District of Columbia, of which the defendant was an editor and proprietor, and from thence to distribute the same to the subscribers to the said paper, who resided in the city of Baltimore; and having reason to believe that the said house would be attacked by a lawless armed and unknown multitude, if the said paper was received and distributed therefrom, he collected, in a peaceable and lawful manner, a number of armed men for the purpose of defending the said house against any attack which might be made thereon by the said unknown multitude as aforesaid; and that it was after the introduction of the said armed men to defend the house, and the commencement of the distribution aforesaid therefrom, that the said armed multitude, as herein before stated, attacked, ruined and spoiled the house. To the admission of which said evidence, under the present declaration, the defendant objected. But the court [BLAND and HANSON, A.J.] overruled the objection, and permitted the whole of said testimony to be given to the jury. The defendant excepted.

The defendant then moved the court to direct the jury, that if they believed the facts so admitted and given in evidence, then the plaintiff was not entitled to recover. Which opinion and direction the court [DORSEY, Ch.J.] gave to the jury. The plaintiff excepted; and the verdict and judgment being against her, she appealed to this court.

JOHNSON, J. The action in this case was brought in Baltimore County Court, to recover damages for a dwelling-house on Charles Street, in the city of Baltimore, which was materially injured during the time it was let by the plaintiff to the defendant.

The facts as they present themselves on the bill of exceptions are: [He here stated the case.]

The declaration contains two counts, the one an action on the case in the nature of waste, the other on an implied undertaking to restore the property in good tenantable repair, alleging as the breach the destruction of the property by the defendant.

Actions of the present nature have been seldom if ever brought in this state; indeed a transaction similar to the present never before, and it is greatly to be deplored ever did, and it is hoped never will arise again, in which *private property* has been by force destroyed against the exertions of the civil authority, collected on the spur of

the occasion for its preservation. But as the property has been destroyed, as between the landlord and tenant, the question is, Who must bear the burden of the loss?

In forming an opinion on the present subject it is not necessary to trace the law of waste, as it existed at common law, or as changed by the statutes of Marlbridge and of Gloucester; it is sufficient to observe, that those statutes make a *lessee for years* liable to the action of waste, in which, when determined against the tenant, he forfeited the place wasted, and was compelled to pay treble damages.

Waste, *vastum*, is a spoil or destruction in houses, etc., to the disherison of him that hath the remainder or reversion in fee simple or fee tail. The removing wainscot floors, or other things once fixed to the freehold, is waste. Co. Litt. 53. 4 Rep. 64. 2 Blk. 281.

Waste is *voluntary*, a crime of commission, as *pulling* down a house; or *permissive*, which is matter of *omission* only, as by suffering it to fall for necessary repairs.

If the property in question had been destroyed, as set forth in the plaintiff's claim, by the *defendant himself*, or by others at *his instance*, it is clear he made himself liable to an action of waste; wherein not only would have been recovered the house let (supposing the lease not expired), but treble damages. The injury done to the property would have assumed the denomination of *wilful waste*. But as the destruction was not, in the common acceptance of the term, made by himself, or by others at his instance, is he liable?

It is not novel in the law to make persons, morally innocent, responsible for the acts of those over whom they had no control. In various instances, where the property of the owner is placed in the care of another, such person is liable to the owner for its loss, or for injuries done to it, which the possessor could not restrain.

The common carrier, the inn-keeper, the sheriff, and others not thought material to enumerate, are responsible for losses which they could not prevent. They stand liable to the owner for all losses, whether sustained by highway robbers, or others, no matter how *incontrollable* and *irresistible* may be the force with which they are assailed. The act of God, and of the public enemies, will only free them from the demand, when the loss proceeded from such act or such enemies, and then only when they are free from every exception.

If the law was otherwise, by conniving with the robbers and thieves, no property could be safe in their custody; it would scarcely ever be in the owner's power to ascertain whether the loss was the result of concert, or of force — whether the alleged attack might or might not have been resisted. To free them from all temptation to swerve from their duty, and to secure an effectual remedy to those who intrust them with their property, all excuses of the kind spoken of are precluded; for it is better that, occasionally, the loss should fall

on an innocent person, *than* to relax, and in effect, to defeat all liability.

At the common law all such as were liable to the action of waste, no matter what might be their situation, no matter what might be the power to repel the waste from being done, if it was committed, they were bound to respond. The infant age of the tenant would not free him from the responsibility. Under the statutes of Marlbridge and Gloucester, the same liabilities are cast on the tenant for years.

The defendant, in the case before the court, comes within the purview of those statutes, and must therefore be responsible, unless the overwhelming force, by which the injury was done, exonerates him.

As the property of the landlord is placed in the tenant's possession, who has the legal power to prevent all waste from being done to it, and to recover for it, when committed, as in most instances it would be impossible for the landlord to ascertain in time, or come at the wrongdoer, it appears to have been the policy of the law to cast the liability on the part of the tenant for all waste committed on the property, except when caused by the act of God, or of the King's enemies. But let it, for argument's sake, be conceded, that if the defendant had continued to use the house for the purpose it was let to him, and that whilst so used, the lawless multitude attacked and destroyed it, that he would not have been liable, *a point not necessary to be determined in this case*; yet as he did of his own authority, without the consent of the plaintiff, divert the house to a totally different and much more dangerous purpose, well aware of the risk which the property would thereby have to encounter, on principles of law and justice, as between him and the plaintiff, he becomes responsible for the consequences.

If the common carrier, who puts to sea during a storm, or on its approaching, cannot exonerate himself from the loss the storm may produce, which he attempted to buffet, so it appears equally just that a *tenant*, who applies the property to a different purpose than it was let to him, aware of the great increase of risk, in consequence of such diversion, *must bear*, and not *cast* the responsibility on the landlord. My opinion, therefore, is, that on principles of law and justice, the merits of the case are with the plaintiff.

The action of waste appears to have given way to, or been superseded by, the action on the case in *nature of waste*, which is the first count in the present declaration. Two grounds have been relied on against the first count:—

1st. That the evidence does not support the count; and

2d. That if the defendant was liable, yet as the *waste was permissive*, and not *voluntary*, an action on the case, in the nature of waste, will not lie.

The declaration, it is true, states the destruction of the property to have been made by the defendant, and by those taken into the house by him.

In common parlance a person cannot be said to have done an act which was done by another; nor can he be charged with causing a destruction to take place when every exertion in his power was used to prevent it. But in the legal acceptance of the charge, he who does certain acts, by others, is said to have done them himself. *Qui facit per alium facit per se*. If the tenant is *generally* responsible for *all* waste committed by strangers, no matter how overwhelming the power, how much more strong is the case before the court, when the property in question was applied to a different object than that for which it was let; the defendant having reason to believe that in consequence of such application "the house would be attacked by a lawless armed and unknown multitude." — As, between the plaintiff and defendant, the acts of the multitude produced by the acts of the defendant and those in concert with him, must be imputable to the defendant himself, of course the charge, as contained in the count, is correct.

The second objection to the count by the preceding reasoning is also removed; for, if the defendant is to be liable as of himself, for the waste committed by the lawless multitude, then it follows that the destruction to the property in question comes strictly under the denomination of *voluntary* waste, for which no doubt is entertained but that the present action is applicable. It would then appear that there is no need to form an opinion, whether the action on the case, in the nature of waste, will or will not lie for permissive waste; but the inclination of my mind is, that that action will be sustained as well for the one as for the other description of waste. It is a form of action, long since introduced, to recover for such injuries; it is an equitable action, and ought not to be discountenanced; it confines the recovery to the real loss sustained; and I see no reason to say that it will not lie in *all cases*, and against *all* persons, who are at common law, or under the statutes of Marlbridge and Gloucester, made *liable to the action of waste*.

As the case is covered by the first count in the declaration, I deem it totally unnecessary to add whether the evidence sustains the second.

The opinion of the court below, as pronounced on the second bill of exceptions, is erroneous, and the judgment obtained in consequence thereof is reversed.

MARTIN, J., dissented.

*Judgment reversed, and procedendo awarded.*

## FAY v. BREWER.

3 Pick. (Mass.) 203. 1825.

ACTION on the case in the nature of waste, for cutting down trees.

The defendant offered to prove that the trees were cut down by other persons, mere trespassers, without his consent or knowledge.

PER CURIAM. It is clear that a tenant for life is bound to see that trespassers do not injure the estate, and for this purpose the law gives him an action of trespass. So that whether waste is committed by himself or by a stranger, he is alike answerable to the reversioner.

NOTE. — See, *accord*, *Cargill v. Sewall*, 19 Me. 288, 291; *Wood v. Griffin*, 46 N.H. 230; *Dix v. Jaquay*, 94 N.Y. App. Div. 554 (citing previous New York cases); *Regan v. Luthy*, 16 Daly (N.Y.) 413 (a tenant removed from the house, and securely closed the premises, but shortly thereafter the plumbing was cut out and stolen by persons unknown); *Powell v. Dayton R.R. Co.*, 16 Or. 33 (lessee liable for acts done while its property was in the hands of a receiver); *Parrott v. Barney*, Fed. Cas. 10773 a.

*Cf. Winfree v. Jones*, 104 Va. 39. The tenant removed from the leased house. "The house was entered and burned by some one unknown to the plaintiff three weeks after it was vacated." The tenant was held not liable, even though he had not securely fastened the doors on leaving.

A, tenant in dower, assigned her estate to B, and B committed waste. A was held not liable. *Foot v. Dickinson*, 2 Met. (Mass.) 611.

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BEWICK v. WHITFIELD.

3 P. Wms. 267. 1734.

A was tenant for life, remainder to B in tail, as to one moiety, remainder as to the other moiety to C, an infant in tail, remainder over. There was timber upon the premises greatly decaying; whereupon B the remainderman brought a bill, praying, that the timber that was decaying might be cut down, and that the plaintiff, the remainderman in tail, together with the other remainderman, the infant, might have the money arising by the sale of this timber. On the other hand, the tenant for life insisted to have some share of this money.

LORD CHANCELLOR. The timber, while standing, is part of the inheritance; but whenever it is severed, either by the act of God, as by tempest, or by a trespasser and by wrong, it belongs to him who

has the first estate of inheritance, whether in fee or in tail, who may bring trover for it; and this was so decreed upon occasion of the great windfall of timber on the Cavendish estate.

As to the tenant for life, he ought not to have any share of the money arising by the sale of this timber; but since he has a right to what may be sufficient for repairs and botes, care must be taken to leave enough upon the estate for that purpose; and whatever damage is done to the tenant for life on the premises by him held for life, the same ought to be made good to him.

NOTE. — See, *accord*, *Richardson v. York*, 14 Me. 216; *White v. Cutler*, 17 Pick. (Mass.) 248; *Mooers v. Wait*, 3 Wend. (N.Y.) 104; *Lane v. Thompson*, 43 N.H. 320; *Williamson v. Jones*, 43 W.Va. 562, 585.

## BOOK VII.

### PROFITS, EASEMENTS, LICENSES, AND COVENANTS RUNNING WITH THE LAND.

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#### CHAPTER I.

#### PROFITS.

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#### SMITH *v.* COOLEY.

65 Cal. 46. 1884.

McKEE, J. Plaintiff in the action out of which this case arises being the owner in fee of a tract of land in El Dorado County known and described as the northwest corner of the northeast quarter of section 9, in township 10 north, range 9 east, Mount Diablo base and meridian, on the 26th of July, 1875, granted to the defendant an interest therein, by the following description, namely: "An undivided third interest in a certain piece of mining ground situated in White Oak Township, county of El Dorado, State of California, on the northwest quarter of the northeast quarter of section 9, township 10 north, range 9 east, Mount Diablo base and meridian [said 'mining ground' being also more particularly described by metes and bounds], together with the water rights, reservoirs, and tail race belonging to the same, and it is expressly conditioned that this instrument conveys no other rights, except a mining right, on the premises above to the said party of the second part, his heirs or assigns."

After the execution and delivery of the grant, plaintiff and defendant, for about four years, worked the "ground" in partnership on the basis of two thirds to the plaintiff and one third to the defendant; but after the expiration of the four years plaintiff gave notice to the defendant that he would not be responsible for any expenses incurred in working the ground, and the defendant has since continued to work it for himself. Under these circumstances plaintiff commenced the action in hand for a partition.

Partition may be had of real property, held and occupied by several persons as coparceners, joint tenants, or tenants in common, according to their respective rights and interest in it, whether the estate which they own therein be an estate of inheritance, or for life



or lives, or for years. § 752, Code Civ. Proc. But in the land itself, described in the deed under which defendant derives his right, the defendant was not a coparcener, joint tenant, or tenant in common. The deed only vested in him a particular estate, *i. e.*, the right of taking from the land any minerals or ores in place in it, to the extent of the interest in them granted to him.

A "mining right" upon a specific piece of ground is a right to enter upon and occupy the ground, for the purpose of working it, either by underground excavations or open workings, to obtain from it the minerals or ores which may be deposited therein. By implication the grant of such a right carries with it whatever is incident to it and necessary to its beneficial enjoyment. *Clark v. Duval*, 15 Cal. 86; *Cave v. Crafts*, 53 Cal. 135. In addition to that implication the grant, in this instance, conveyed an interest "in the water rights, reservoirs, and tail race" on the mining ground. But it did not convey the exclusive dominion of any portion of the ground so as to make the grantee a joint tenant or tenant in common with the grantor. It conveyed only a particular estate, or incorporeal hereditament, in land of which the grantor held the general estate.

This particular estate or incorporeal hereditament is what is known in law as a servitude "in gross," or a personal servitude, imposed upon land for the benefit of the person or persons owning the right, irrespective of the ownership of the land. The right is usufructuary in its nature and character, and entitles the owner to the use of the land for the profits which may be derived from its rents, or from quarrying and digging it for ores, or from harvesting its fruits, crops, and vintages, etc. §§ 802-806, Civ. Code. As an incorporeal hereditament, it is subject to the general rules which govern the enjoyment of real property, and to the laws of descent, devolution, and transfer by act of law, according to the freehold or chattel interest acquired in it; but it is not in its nature capable of partition, because a division of the right would enlarge the original grant beyond the intention of the grantor, and likewise prove a greater charge than was originally intended by the owner of the soil (*Bacon's Ab.* 359); and because, so long as the minerals and ores, which are the subject of the servitude, are in place, unworked and unsevered from the soil, they are incapable of allotment according to quality and quantity relatively considered. § 764, Code Civ. Proc.

*Hughes v. Devlin*, 23 Cal. 502, is not in conflict with this conclusion. The land sought to be partitioned in that case was a "mining claim," which the court held was the subject of partition the same as other real property. But why? Because, as was said in *Merritt v. Judd*, 14 Cal. 60, "our courts have given mining claims the recognition of legal estates of freehold; and as to all practical purposes, if we except some doctrine of abandonment, not, perhaps, applicable to such estates, they unquestionably are."

The working of a mine under a bare "mining right" has been uniformly considered by courts of equity as a species of trade. Hence the legal relation existing between two or more persons interested in such a right is that of a qualified partnership; and the remedies relating to a mining partnership are available for the assertion or violation of any right arising out of it. § 684, and ch. 4, title 10, Civ. Code; *Rich v. Davis*, 6 Cal. 164; *Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490.

*Judgment affirmed.*

NOTE. — The owner of land in which there are minerals may grant the minerals. *Caldwell v. Fulton*, 31 Pa. 475. Or he may grant a profit, entitling the grantee to enter and take the minerals. In the latter case, the right of the grantee does not (in the absence of any agreement to the contrary) prevent the grantor from himself taking the minerals, or from granting to others the right to enter and take the minerals. *Silsby v. Trotter*, 29 N.J. Eq. 228. And the grantee acquires no ownership of the minerals until they are severed, and therefore may not maintain an action to recover from a trespasser the value of the minerals severed by him. *Baker v. Hart*, 123 N.Y. 470.

The law recognizes profits to take minerals, or timber, or turf, or herbage from the land of another. *Queen v. Alnwick*, 9 Ad. & E. 444. So, of a profit to fish or hunt upon the land of another. Co. Lit. 122 a; *Wickham v. Hawker*, 7 M. & W. 63, 79. But a right to take water is said not to be a profit. *Race v. Ward*, 4 El. & B. 702.

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CLAYTON v. CORBY.

5 Q. B. 415. 1843.

LORD DENMAN, C.J. This was an application, on behalf of the plaintiff, for leave to enter a verdict for him with nominal damages, notwithstanding the finding of the jury for the defendant upon his second plea.

The declaration is in trespass for breaking and entering the close of plaintiff, and digging for and removing clay, sand, etc. The said second plea states, in substance, that, before and at the said times, etc., the defendant was the occupier of a certain tenement and premises, to wit a brick kiln, and that he, as such occupier, and all the occupiers for the time being of the said tenement, for the full period of thirty years before, etc., had and enjoyed, as of right and without interruption, a right to dig, take and carry away, from, etc., so much of the clay of the said close as was *at any time required by him or them* for the purpose of making bricks at his said brick kiln, in

every year and at all times of the year, and justifies the alleged trespass accordingly. The replication takes issue on this plea. And the question is whether this plea can be sustained in point of law. And we are of opinion that, upon general principles and the authorities connected with the subject, it cannot.

It is observable that, in all cases of a claim of right *in alieno solo*, whether immediately or in any degree resembling the present, such claim, in order to be valid, must be made with some limitation and restriction. In the ordinary case of common appurtenant, the right cannot be claimed for commonable cattle without stint, and to any number; but such right is measured by the capability of the tenement in question to maintain the cattle during the winter; levancy and couchancy must be averred and proved. Again, in the case of common of estovers, or a liberty of taking wood, called in the books house bote, plough bote and hay bote, such liberty is not wholly vague and indeterminate, but confined to some certain and definite use. The like of the common of piscary. The nature of these rights is thus compendiously, but we believe accurately, given by Mr. Justice Blackstone, 2 Comm. 35: "These several species of commons do all originally result from the same necessity as common of pasture; viz. for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family; common of turbary and fire bote for his fuel; and house bote, plough bote, cart bote, and hedge bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds," that is, for a certain and definite purpose.

In some of these instances, the thing taken is more or less immediately renewable: and it would seem strange if in these such precision and certainty are required, but less in others where the claim is larger, extending, as in the present case, to a right to disturb and remove a portion of the soil itself. Upon reference, however, to the authorities, we find that, in cases not substantially distinguishable from the present, the same rule does, as in reason it ought to do, prevail.

In the case of *Wilson v. Willes*, 7 East, 121, the declaration was trespass for breaking and entering the close of the plaintiff, called Hampstead Heath, and digging and carrying away turf covered with grass, etc. Plea, that the *locus in quo* was parcel of a waste in the manor of Hampstead; that there had been, from time immemorial, divers customary tenements by copy of court roll; and it then alleged a custom for tenants of such tenements, "having a garden or gardens parcel of the same," to dig turf for the making and repairing grass plots in such gardens, every year, at all times of the year, *in such quantity as occasion hath required*: and justified the taking accordingly. To this plea there was a general demurrer; and judgment was given for the plaintiff. In giving judgment, it was said, by Lord

ELLENBOROUGH, that "a custom, however ancient, must not be indefinite and uncertain;" that it was "not defined what sort of improvement the custom extends to;" that "every part of the garden may be converted into grass plots;" that there was "nothing to restrain the tenants from taking the whole of the turbury of the common;" and it resolved itself "into the mere will and pleasure of the tenant."

In the case of *Peppin v. Shakespear*, 6 T. R. 748, the declaration was trespass for breaking, etc., the plaintiff's close. The plea stated the grant to the defendant Shakespear of a customary tenement of the manor of which the *locus in quo* was parcel, and a custom for the tenants thereof to have common of pasture, and, also, a *liberty of digging sand, etc., for their necessary repairs*; there was then a justification of the breaking, etc., into the *locus in quo*, as parcel of the common, for such purpose. The court gave judgment for the plaintiff, on account of defects in the plea: in which judgment it was said that the plea "stated that the defendant entered, etc., for the purpose of digging for and carrying away sand, etc., *for the necessary repairs of the said defendant.*" "That no question could be made about any of the pleas" (there having been others, which it is not necessary for us to notice) "but that in which it was stated that the tenement was a messuage. And with respect to that they said that it ought to have been expressly alleged *that the house was in want of repair*, that the defendants entered for the purpose of digging for and carrying away sand, etc., for the necessary repairs of that house, and that they used the sand, etc., *for that purpose.*"

It is true that these two cases respect the validity of a custom; but the reasons upon which the judgments are respectively founded have a strong bearing upon the degree of certainty and precision with which a claim of right generally, in order to be supported, ought to be described.

It remains now to be considered whether the objection of vagueness and uncertainty be applicable to the plea in question or not. And we think that it is.

The nature of the tenement (so called), a brick kiln, leads to no conclusion, one way or the other, as to the extent of the claim and demand upon the soil of the plaintiff. It may have been, at the time of the trespass, of any dimensions and capacity. It may have been, during the thirty years of alleged enjoyment, continually varying; and consequently the quantity of clay required for the purpose of making bricks thereat may have varied also. There is no limit. No amount of clay (measured by cart loads or otherwise) "required," no number of bricks (estimated by hundreds or thousands) claimed to be made, is given or attempted. What is it, therefore, but an indefinite claim to take *all* the clay "out of and from the said close in which, etc.," or, in other words, to take from the plaintiff, the owner, the whole close?

We are of opinion, therefore, that the plea cannot be sustained, and that there must be judgment for the plaintiff for nominal damages, notwithstanding the finding of the jury for the defendant upon that plea.

*Rule absolute.*

NOTE. — A profit may be in gross, and such a right is assignable. *Muskett v. Hill*, 5 Bing. N. C. 694.

Or a profit may be appurtenant. See, respecting the limit of the right in such case, in *accord* with the principal case, *Hall v. Lawrence*, 2 R.I. 218.

A profit appurtenant is assigned by a transfer of the land to which it is appurtenant, without express mention of the profit. *Sacheverill v. Porter*, Cro. Car. 482. It cannot be severed from the land. *Drury v. Kent*, Cro. Jac. 14.

## CHAPTER II.

## EASEMENTS.

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BOATMAN v. LASLEY.

23 Ohio St. 614. 1873.

MOTION for leave to file a petition in error to the District Court of Gallia County.

The original action was brought in the Court of Common Pleas of Gallia County by Matthew Lasley against Isaac Boatman and wife, to foreclose a mortgage executed by the defendants to secure the payment of purchase money of the lands mortgaged. The mortgaged premises had been conveyed by the plaintiff to defendant, Isaac Boatman, on the 15th of March, 1870, by a deed containing a covenant that the demised premises were free and clear of all incumbrances. The defendant answered, and by way of counter-claim, alleged damages resulting from a breach of this covenant against incumbrances. The alleged incumbrance consisted of a private right of way over the warranted premises, outstanding at the date of the conveyance in one Alexander Logue. This right of way had been granted by deed, on the 7th day of June, 1862, by the warrantor, to Logue, his heirs and assigns, and the tenants or occupiers for the time being of the lands now (then) owned and occupied by the said Alexander Logue, in section 15, town 5, of range 14, in the Ohio Company's Purchase. It is also alleged in the answer, that, before the 15th of March, 1870 (the date of the covenant), said Logue had conveyed his lands in section 15, town 5, of range 14, in the Ohio Company's Purchase, to one George W. Roush. It is not alleged, however, that Logue, at the time the right of way over the warranted premises was granted to him by the plaintiff, was the owner or occupier of any land in said section 15, or elsewhere, nor is it alleged that the right of way complained of became appurtenant or appurtenant to any land whatever, or that said Roush had any interest in said right of way.

The plaintiff, in his reply, denied that Roush had an easement or right of way on the premises granted to the defendant, and also denied that the defendant had sustained any damage by reason of the right of way complained of.

The cause was submitted to a jury, who assessed the defendant's

damages, by reason of the existence of the right of way, at \$100, which sum was deducted from the mortgage debt, and decree entered in favor of the plaintiff for the balance.

During the trial the defendant took a bill of exceptions, from which it appears that the defendants offered in evidence the deed for the right of way from Lasley to Logue, a copy of which is attached, marked "A." They also gave evidence tending to prove that said right of way was still in the occupation of said Alexander Logue, and those claiming under him, who were then occupying the lands to which said right of way was intended to be made appendant. "And the plaintiff, to maintain the issue on his part, gave evidence tending to show that at the time said deed of right of way was executed by him to Alexander Logue, the said Logue did not own the land to which the right of way was intended to be appendant, and that said Logue had, prior to the execution of the deed of right of way, conveyed said lands to one George W. Roush."

The evidence being closed, the court charged the jury as follows: "If the jury shall find from the evidence that at the date of the deed made by Lasley to Logue, marked 'A,' the said Alexander Logue, grantee therein, was not the owner in fee or otherwise of some real estate adjoining the farm through which said right of way is granted, or situate in the neighborhood, so that said right of way may become appurtenant to the same, then the said deed conveys a right of way personal to himself alone — one which cannot descend to his heirs, and one which he cannot assign or release to another person, except such other person be the owner of the farm through which said way was granted."

The judgment of the Common Pleas was afterward, on petition in error, affirmed by the District Court of Gallia County.

Leave is now asked to file a petition in error in this court to reverse the judgment below, for alleged error in the charge to the jury as above set forth.

McILVAINE, J. Is a private right of way over the lands of another, in gross, such an interest or estate in land as may be cast by descent, or may be assigned by the grantee to one who has no interest in the land? These are the only questions in this case. If such a right be inheritable or assignable, the Court of Common Pleas erred in its charge; otherwise there is no error in the record.

The terms of the deed from Lasley to Logue plainly import an intention to make the right of way therein granted appendant and appurtenant to other lands, but the record does not disclose either the facts or the law given to the jury, whereby it could determine whether or not that intention was accomplished. It simply shows that the jury was instructed that if the right of way granted did not and could not, under the circumstances, become appurtenant to lands other than those over which it was granted, then it was a mere

personal right in the grantee, which could not be inherited from him, or transferred by him to a stranger.

The correctness of this instruction does not depend upon a construction of the deed by which it was granted, for the terms of the grant are "to Alexander Logue, his heirs and assigns." The real question is, whether or not a private right of way in gross is, in law, capable of being transferred or transmitted.

It is strongly insisted upon, in argument, that a right of way in gross may be conveyed to the grantee "and to his heirs and assigns forever," because an owner in fee may carve out of his estate any interest less than the whole and dispose of the less estate absolutely; and this because the power to dispose of the whole estate includes a power to dispose of any part of it.

This argument assumes the affirmative of the very question in controversy, to wit, that such a right of way is *an interest or estate in the land*.

A mere naked right to pass and repass over the land of another, a use which excludes all participation in the profits of the land, is not, in any proper sense, an interest or estate in the land itself. Such a right is in its nature personal; it attaches itself to the person of him to whom it is granted, and must die with the person.

If such right be an inheritable estate, how will the heirs take? In severalty, in joint tenancy, coparcenary, or as tenants in common? If not in severalty, how can their interests be severed?

If it be assignable, what limit can be placed on the power of alienation? To whom and to how many may it be transferred? Why not to the public at large, and thus convert into a public way that which was intended to be a private and exclusive way only?

Where the way is appendant or appurtenant to other lands, very different considerations arise. There the right attaches to the lands to which the way is appurtenant, because it is granted for the convenience of their occupation without respect to the ownership or number of occupants. In such case the right of way passes with the dominant estate as an incident thereto. A right of way appendant cannot be converted into a way in gross, nor can a way in gross be turned into a way appendant.

A very marked distinction also exists between a way in gross and an easement of *profit à prendre*; such as the right to enter upon the lands of another, and remove gravel or other materials therefrom. The latter so far partakes of the nature of an estate in the land itself as to be treated as an inheritable and assignable interest. *Post v. Pearsall*, 22 Wend. 432.

Both upon principle and authority, we think there was no error in the charge of the court below. Mr. Washburn in his work on Easements, page 8, par. 11, states the law upon this subject as follows: "A man may have a way in gross over another's land, but it must,



from its nature, be a personal right not assignable or inheritable; nor can it be made so by any terms in the grant, any more than a collateral and independent contract can be made to run with the land." See also *Ackroyd v. Smith*, 10 C. B. 164; *Garrison v. Budd*, 19 Ill. 558; *Post v. Pearsall*, 22 Wend. 432; Woolrych on Ways, 20; 2 Black. Com. 35; 3 Kent's Com. 420, 512.

*Leave refused.*

NOTE. — See, *accord*, *Fisher v. Fair*, 34 S.C. 203.

There are dicta, *accord*, in *Wagner v. Hanna*, 38 Cal. 111, 116; *Moore v. Crose*, 43 Ind. 30, 34; *Kuecken v. Voltz*, 110 Ill. 264, 268; *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 38; *Cadwalader v. Bailey*, 17 R.I. 495, 499.

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### GOODRICH v. BURBANK.

12 All. (Mass.) 459. 1866.

FOSTER, J. This action of tort is brought to recover damages for the acts of the defendant on his own land, who has cut off a pipe by which water was conducted from a spring thereon, and has contaminated the water which flowed through said pipe to the plaintiff's premises. The lot on which the spring is situated was part of a farm owned by Thomas F. Plunkett, and conveyed to the defendant by Plunkett by a deed dated March 27, 1850, containing the following clause: "Also reserving to myself, my heirs and assigns, the right of taking so much water forever from the spring situate on the lot last above described, and from which water is now taken in a pipe to supply the grounds of W. H. Tyler, as now runs in said pipe, so long as said pipe lasts, together with the right to replace the same with a pipe of one and one quarter inch inside calibre, and also the right of taking so much water from said spring as will run in said pipe of one and one quarter inch calibre, when thus substituted for the present pipe, together with the right to enter and repair said aqueduct at all times, it being understood that I am to pay such damages as may be from time to time occasioned to the crops and land by said repairs, and said Burbank, his heirs and assigns, is not to molest said Plunkett, his heirs and assigns, in the use of the above-reserved rights." At the date of this deed, the pipe was laid as it now is through the defendant's estate, and conducted water to the premises of W. H. Tyler. No part of Plunkett's remaining estate was then or ever had been supplied with water from this aqueduct. It is therefore improbable that the reservation was intended for the exclusive benefit thereof. Plunkett had given to Tyler no right, but the latter had only a revocable license from Plunkett's predecessor to the use of

the aqueduct; and there is no reason to suppose that Plunkett intended to annex the reservation to the estate of a stranger, if that were possible. The language used is broad and unqualified. The right is reserved to Plunkett, his heirs and assigns, and not to the assigns of his remaining estate. There is no restriction as to the place where or the purpose for which the water might be used, but only as to the quantity reserved. We are therefore satisfied that Plunkett intended to retain for himself, his heirs and assigns, a right, the enjoyment of which was limited to no particular premises, capable of being used upon any land which he or they might at any time acquire, an assignable and inheritable interest, not annexed to any parcel of land. If the rules of law permit the acquisition of such a right by reservation or grant, we cannot doubt that it has been effectually created in the present instance. And if so, it must inure to the benefit of the present plaintiff, who has derived it by warranty deed from Plunkett through divers mesne conveyances.

But the defendant insists that such an interest is a predial servitude, in its nature inseparably annexed to some estate, apart from which it cannot be enjoyed; that if regarded as an easement in gross, it is necessarily of a purely personal character, incapable of assignment or inheritance, belonging to Plunkett alone for his personal benefit.

This proposition requires examination. There are *dicta*, perhaps authorities, to the effect that an easement proper, like a way in gross, cannot be created by grant, so as to be assignable or inheritable. Washburn on Easements, 80. *Ackroyd v. Smith*, 10 C. B. 187. However the law may be elsewhere, it would be difficult to establish that doctrine in this commonwealth, where it has been held that ways in gross "may be granted or may accrue in various forms to one, his heirs and assigns;" *White v. Crawford*, 10 Mass. 188; and that "the law is settled in Massachusetts, by a series of decisions, that a right of way may be as well created by a reservation or exception in the deed of the grantor, reserving or retaining to himself and his heirs a right of way either in gross or as annexed to lands owned by him so as to charge the lands granted with such easement and servitude, as by a deed from the owner of the land to be charged, granting such way either in gross or as appurtenant to other estate of the grantee." *Bowen v. Connor*, 6 Cush. 137.

In the case of rights of *profit à prendre*, it seems to be held uniformly that, if enjoyed in connection with a certain estate, they are regarded as easements appurtenant thereto, but if granted to one in gross they are treated as an estate or interest in land, and may be assignable or inheritable. *Post v. Pearsall*, 22 Wend. 425. Washburn on Easements, 7. The right to take water from a well or spring is held to be an interest in land, although not a *profit à prendre*, and may be claimed by custom. *Race v. Ward*, 4 El. & Bl. 702. And we

are aware of no case which denies that the right to an aqueduct may be so created as to exist independently of any particular parcel of land owned by the grantee thereof, and be enjoyed by him and his heirs on any estate which he or they may own or acquire, and be capable of assignment or conveyance in gross. The water itself may not be the subject of property, but the right to take it and to have pipes laid in the soil of another for that purpose, and to enter upon the land of another to lay, repair and renew such pipes, is an interest in the realty, assignable, descendible and devisable. On this subject the language of Judge Curtis is as follows: "I know of no rule of the common law which prohibits grants of the incorporeal right to divert water from being made in gross. If I have a spring, I may sell the right to take water from it by pipes, to one who does not own the land across which the pipes are to be carried, and I may either restrict the use to a particular house, or not, as I please. It is true the grantee cannot make the grant useful without acquiring from the owner of the intermediate land the right to lay pipes therein, nor can he use the water in a house until he obtains the right to possess that house. But these may be acquired afterwards. Incorporeal rights may be inseparably annexed to a particular messuage or tract of land, by the grant which creates them, and makes them incapable of separate existence. But they may also be granted in gross, and afterwards, for purposes of enjoyment, be annexed to a messuage or land, and again severed therefrom by a conveyance of the messuage or land, without the right, or a conveyance of the right without the land." *Lonsdale Co. v. Moies*, 21 Law Rep. 664.

We have many cases in our own reports which recognize the right to take a certain quantity of water from a mill pond as a distinct and substantive subject of grant, without restriction as to its use at any designated place. Rights of water duly granted by deed, not appurtenant to any particular parcel of land, may be used by the owner at any place or in any manner, so long as he does not interfere with or impair the rights of others. *De Witt v. Harvey*, 4 Gray, 486. We are unable to distinguish between the right to take water by a canal from a pond for the purposes of power, and the right to take it from a spring in a pipe for domestic purposes, the watering of cattle, to supply an artificial jet or fountain, and to sell it to others for any uses they may desire to make of it.

In the present case it does not appear that the change in the direction or location of the pipe after it leaves the land of the defendant has increased the quantity of water taken from the spring. We are therefore of opinion that this action can be maintained; and, the judge who presided at the trial in the superior court having ruled otherwise, the exceptions are sustained

NOTE. — See, *accord*, *Engel v. Ayer*, 85 Me. 448 (maintaining a

boom); *Shreve v. Mathis*, 63 N.J. Eq. 170 (right of way); *Mayor v. Law*, 125 N.Y. 380 (wharfage); *Poull v. Mockley*, 33 Wis. 482.

There is a dictum, *accord*, in *Hall v. Ionia*, 38 Mich. 493, 499.

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### WILLOUGHBY v. LAWRENCE.

116 Ill. 11. 1886.

THE lessees of a tract of land used as a trotting park gave to the plaintiffs for a valuable consideration the right to use the fences and all the buildings erected or to be erected upon the tract, except the club house, for advertising purposes. The question was whether this right was effective against assignees of the lease.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

The first question is as to the nature of the interest acquired by appellants under their contract. It gave them and their heirs, representatives and assigns, the right to use all of the surfaces of the fences and buildings (except the club house) for advertising purposes, for a period of nearly five years, or ten years, if Lawrence & Martin, or their assigns, should occupy the premises so long. "All of the surface of said fences" included the inside as well as the outside of the main fence. The buildings were inside of the enclosure. Therefore the right to use the fences and buildings for the purpose of posting advertising notices upon them, involved and included the right of entry upon the premises to reach the buildings and the inner surface of the fence. The privileges accorded involved and implied a right of way upon the land to the inside of the fence and to the surface of the buildings. Such a right, if not actually an easement, was a burden or servitude in the nature of an easement.

The general rule is, that two distinct tenements are necessary to the creation of an easement, — the dominant, to which the right belongs, and the servient, upon which the obligation rests, — as, if the owner of one farm has a right of way over the adjoining farm, that in favor of which the right is exercised is the dominant tenement, that over which it is exercised is the servient tenement. Washburn on Easements and Servitudes, p. 3, *et seq.*; *Garrison v. Rudd*, 19 Ill. 558. In easements of this character the burden rests upon one piece of land in favor of another piece of land. But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and therefore called rights in gross. Washburn on Easements, 4. In such cases the burden rests upon one piece of land in favor of a person or individual. The principal distinction between an easement and a right of way in gross is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross, and

personal to the grantee, because it is not appurtenant to other premises. The owner of premises may grant the right of way in either form. *Wagner v. Hannah*, 38 Cal. 111. There is, moreover, a kind of appendancy or appurtenancy of one easement to or upon another easement, in some cases, which is sometimes called a secondary easement. It passes with the principal easement, as being necessary or convenient to the enjoyment of the same. The grant of a right of pasturage carries the right of way to and from the pasture. So, that of drawing water, or of fishing, or hunting, gives a right of access and egress to and from the estate in which it is to be enjoyed. Washburn on Easements, p. 39; *Alexander v. Tolleston Club*, 110 Ill. 65. In the case at bar, a certain right of way, or right of access and egress to and from the trotting park, passed with the privileges of using the fences and buildings for advertising purposes, as being necessary and convenient to the enjoyment of such privileges. The right conferred upon appellants by the contract was more than a mere revocable license, as claimed by appellees, because Willoughby & Hill actually constructed the fence at an expense to themselves of \$2300, and fully executed their part of the agreement. Washburn on Easements, pp. 29, 30, *et seq.*; *Van Ohlen v. Van Ohlen*, 56 Ill. 528. They acquired, by the terms of their contract, a certain interest in these premises, which was in the nature of a right of way in gross, and which a court of equity will regard as at least an equitable charge or burden thereon in their favor.

The next question is, whether the Chicago Jockey and Trotting Club, immediate assignee from Lawrence & Martin, took the lease and improvements subject to this burden or freed from it. In order to determine this question, it is necessary to determine whether the club had notice, actual or constructive, of the rights of appellants under the contract, or made its purchase under such circumstances as put it upon inquiry as to those rights. To bind a purchaser of a servient estate by a servitude charged thereon, he should have notice thereof, as in case of other incumbrances upon land. Washburn on Easements, 42, note 2; *McCann v. Day*, 57 Ill. 101. The contract was recorded on the second day of August, 1878. Was it an instrument of such a character that its record operated as notice to the club? The 31st section of the Conveyance Act provides, that "deeds, mortgages, and other *instruments of writing relating to real estate*, shall be deemed, from the time of being filed for record, notice to subsequent purchasers and creditors, though not acknowledged or proven according to law." The 38th section of the same act provides, that "the term 'real estate,' as used in this act, shall be construed as coextensive in meaning with 'lands, tenements and hereditaments,' and as embracing *all chattels real*." The lease from Magie & Tree to Lawrence & Martin was a chattel real, and was entitled to record to give notice of the leasehold interest of the lessees therein. The con-

tract in question, conveying the use for certain purposes of the fences and buildings upon land, which is particularly described, and involving a right of way upon the land in order to enjoy such use, is an instrument in writing relating to a chattel real. Under the 28th section of the Conveyance Act it is an instrument "*relating to or affecting the title to a chattel real.*" It imposes a charge or burden upon the leasehold interest of Lawrence & Martin, and designates an interest, which is carved out of that estate or included in it. We do not perceive why it is not embraced in the class of instruments whose record affects subsequent purchasers and creditors with notice.

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### HILL v. TUPPER.

2 H. & C. 121. 1863.

**DECLARATION.** — For that, before and at the time of the committing by the defendant of the grievances hereinafter mentioned, the plaintiff was entitled to, and had and was possessed of, the sole and exclusive right or liberty to put or use boats on a certain canal, called the Basingstoke Canal, for the purposes of pleasure and to let the same boats for hire on the said canal for the purposes of pleasure. Yet the plaintiff says that, whilst he was so entitled and possessed as aforesaid, the defendant, well knowing the premises, wrongfully and unjustly disturbed the plaintiff in the possession, use and enjoyment of his said right or liberty, by wrongfully and unjustly putting and using, and causing to be put and used, divers boats on the said canal for the purposes of pleasure, and by letting boats on the said canal for hire, and otherwise for the purposes of pleasure. By means of which said premises the plaintiff was not only greatly disturbed in the use, enjoyment and possession of his said right and liberty, but has also lost great gains and profits which he ought and otherwise would have acquired from the sole and exclusive possession, use and enjoyment of his said right or liberty, and was otherwise greatly aggrieved and prejudiced.

**Pleas.** — First: not guilty. Secondly: that the plaintiff was not entitled to, nor had he, nor was he possessed of, the sole and exclusive right or liberty to put or use boats on the said canal for the purposes of pleasure, nor to let the said boats for hire on the said canal for the purposes of pleasure as alleged. — Issues thereon.

At the trial, before BRAMWELL, B., at the London Sittings, after last Hilary Term, the following facts appeared: — Under the 18 Geo. 3, c. 75, the Company of Proprietors of the Basingstoke Canal Navigation were incorporated with perpetual succession and a common seal, for the purpose of making and maintaining a navigable

canal from the town of Basingstoke, in the county of Southampton, to communicate with the river Wey in the parish of Chertsey, in the county of Surrey. The lands purchased by the company of proprietors, under their parliamentary powers, were by the act vested in the company.

By the 100th section of the act it is enacted: "That it shall and may be lawful for the owners and occupiers of any lands or grounds adjoining to the said canal, *to use upon the said canal any pleasure boat or boats*, or any other boat or boats, for the purpose of husbandry only, or for conveying cattle from one farm, or part of a farm or lands, to any other farm or lands of the same owner or occupier, without interruption from the said company of proprietors, their successors or assigns, agent or agents, and without paying any rate or duty for the same; and *so as such boat or boats be not above seven feet in breadth*, and do not pass through any lock to be made on the said navigation, without the consent of the said company of proprietors, their successors or assigns, *or be employed for carrying any goods, wares or merchandise to market or for sale, or any person or persons for hire*; and so as the same shall not obstruct or prejudice the said navigation, or the towing paths, or obstruct any boats passing upon the said navigation liable to pay the rates or duties aforesaid; and the owner of all such pleasure boats, or other boats, shall, in his own lands or grounds, make convenient places for such boats to lie in, and shall not suffer them to be moored or remain upon the said canal."

The defendant was the landlord of an inn at Aldershot adjoining the canal, and his premises abutted on the canal bank. The plaintiff, who was a boat proprietor, also occupied premises at Aldershot on the bank of the canal, which he held under a demise from the company of proprietors, and by virtue of the demise claimed the exclusive right of letting out pleasure boats for hire upon the canal, which was the right the defendant was alleged to have disturbed.

The lease under which the plaintiff claimed this right was dated the 29th of December, 1860, and by it, in consideration of the rents, covenants and agreements therein contained, the said company of proprietors demised to the plaintiff, under their common seal, for the term of seven years from the 24th of June, 1860, at the yearly rent of 25*l.*, "All that piece or parcel of land containing nineteen poles or thereabouts, adjoining Aldershot wharf, situate in the parish of Aldershot aforesaid, and the wooden cottage or tenement, boathouse, and all other erections now or hereafter being or standing thereon, etc." (describing the premises by boundaries, and by reference to a plan), "together with the appurtenances to the same premises belonging. *And also the sole and exclusive right or liberty to put or use boats on the said canal, and let the same for hire for the purposes of pleasure only.*" The lease contained various covenants framed with the object of preventing any interference by the plaintiff's pleasure

boats with the navigation of the canal, and a proviso for re-entry for any breach of the covenants.

The evidence of the defendant was at variance with that adduced on behalf of the plaintiff upon the question whether the defendant had ever let out boats upon the canal for hire, in the sense of a direct money payment. The defendant did not deny that he kept pleasure boats, and used them upon the canal, but stated that he kept them for the use of his family; he admitted, however, that gentlemen had come from time to time to his inn and used these boats for fishing and bathing.

The learned judge reserved leave to move to enter a nonsuit or verdict for the defendant, and left to the jury the question whether the defendant had obtained any pecuniary advantage from the boats. The jury found a verdict for the plaintiff; damages, a farthing.

Hance, on a former day in this term, obtained a rule *nisi* to enter a nonsuit or verdict for the defendant on the ground, first, that the Company of Proprietors of the Basingstoke Canal Navigation had no power to grant the exclusive right claimed; secondly, that, if the grant were good, the action would not lie by the plaintiff against the defendant for the alleged infringement of the right: or for a new trial on the ground of misdirection by the judge in directing the jury that the defendant was liable if he obtained any pecuniary advantage from the boats.

POLLOCK, C.B. We are all of opinion that the rule must be absolute to enter the verdict for the defendant on the second plea. After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision than that the case of *Ackroyd v. Smith*, 10 C.B. 164, expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right. It is argued that, as the owner of an estate may grant a right to cut turves, or to fish or hunt, there is no reason why he may not grant such a right as that now claimed by the plaintiff. The answer is, that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by act of parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed.



MARTIN, B. I am of the same opinion. This grant is perfectly valid as between the plaintiff and the canal company; but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created. To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between the plaintiff and the canal company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal company to sue in their name. The judgment of the Court of Common Pleas in *Ackroyd v. Smith*, 10 C.B. 164, and of Lord BROUGHAM, C., in *Keppell v. Bailey*, 2 Myl. & K. 517, 535, are, in the absence of any case to the contrary, ample authority for our present decision.

NOTE. — In *Keppell v. Bailey*, 2 M. & K. 517, Lord Chancellor BROUGHAM said (p. 535): "But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property, at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed."

In *Ackroyd v. Smith*, 10 C. B. 164, CRESSWELL, J., said (p. 188) that the owner of land could not "render it subject to a new species of burthen, so as to bind it in the hands of an assignee."

In *International Tea Stores Co. v. Hobbs*, [1903] 2 Ch. 165, FARWELL, J., said (p. 172) that a right to enjoy the gardens and park of another was not known to the law as an easement. In *Attorney-General v. Antrobus*, [1905] 2 Ch. 188, the Attorney-General claimed that the public had a right to come upon certain premises owned by the defendant, as constituting "a national monument of great interest." FARWELL, J., held (p. 198) that *jus spatiandi* was not known to the law "as a possible subject-matter of grant or prescription."

In *Norcross v. James*, 140 Mass. 188, HOLMES, J., said (p. 191): "The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land. The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed. 5 Rep. 16 a, 24 b. They must be "for the benefit of the estate." *Cockson v. Cock*, *ubi supra*. Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. *Keppell v. Bailey*, 2 Myl. & K. 517, 535. *Ackroyd v. Smith*, 10 C. B. 164. *Hill v. Tupper*, 2 H. & C. 121."

But the easements which the law permits are various. Among the well-established easements are rights of way, rights of drainage, and rights of support for party walls. Rights, incident to the ownership of land (see Book VI, *supra*), may be abridged or extinguished, and such abridgment or extinction is said to create an easement against the land.

An easement to have a sign-post on a common near the public-house was recognized in *Hoare v. Metropolitan Board of Works*, L. R. 9 Q. B. 296; and an easement to deposit and hoist merchandise was recognized in *Richardson v. Pond*, 15 Gray (Mass.) 387.

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### CASTNER v. RIEGEL.

54 N.J. L. 498. 1892.

ON *certiorari* removing to this court an order made by two of the township committee of the township of Washington, Warren County, determining and directing that a part of certain line fence on the line between the lands of the parties should be made and maintained by the prosecutor, Emmeline Castner, and another part thereof should be made and maintained by the defendant Riegel.

MAGIE, J. Prosecutrix attacks the order brought before us by this writ upon the ground that the members of the township committee were without jurisdiction to make it. Her contention is that the defendant Riegel is bound by law to make and perpetually maintain a fence along the whole of the line in question, dividing his lands from hers, and that, consequently, the provisions of the Fence Act relative to the determination of the part of a division fence to be made and

maintained by each of two owners bound to make and maintain it equally cannot apply.

The Fence Act imposes on the owners of adjoining lands the duty of making and maintaining a just proportion of the partition fence, except such persons as shall choose to let their adjoining lands lie vacant and open. The act provides that under certain circumstances two of the township committee may determine what part of the partition fence shall be maintained by each owner; but if one of the owners is under obligation to make and maintain the whole fence, it is obvious that the statute is inapplicable, and there will be no power to divide the fence.

Such was the interpretation given to a similar law in New York. *Adams v. Van Alstyne*, 25 N.Y. 232.

It becomes necessary, therefore, to inquire whether the obligation to make and maintain the whole of the partition fence in question rests upon the defendant Riegel. The contention of prosecutrix is that he and those under whom he claims — owners of the lands adjoining hers, and separated by the fence — have, for the period of about thirty-eight years, continually amended and maintained said fence, and that thereby a right in the nature of an easement has been acquired in favor of her lands, and a duty has been imposed upon the lands now owned by him and their owners to continually amend and maintain the fence.

That an obligation to maintain partition fences might arise by prescription which could be enforced by the writ *curia claudenda* at common law, does not admit of doubt. This right was said by Gale & Whatley to be a spurious kind of easement. Gale & W. Easm. 201, 202. The easement seems to be founded upon the duty which at common law required the owner of a close, at his peril, to keep his cattle thereon, and to prevent them from trespassing on an adjoining close; and when the owner of the latter erected a fence for his protection and maintained it for the prescriptive period, he was deemed to have discharged his neighbor from his original duty and to have become bound to protect his own close by some grant or agreement, the evidence of which was lost by lapse of time. But in whatever way the right arose there can be no question that it did arise by prescription at common law. Com. Dig. Droit M. 1 & M. 2; Vin. Abr., tit. "Fences" E.; Washb. Easm. 634; *Ivins v. Acherson*, 9 Vroom 220; *Lawrence v. Jenkins*, L. R. (8 Q. B.) 274.

Did this feature of the common law become a part of the law of New Jersey, and has it been modified or repealed by our legislation concerning fences? Those questions do not seem to have been hitherto mooted in our courts.

In other states, with similar laws, such questions have been dealt with. The earliest case is *Rust v. Low*, 6 Mass. 90, and the opinion is by Chief Justice Parsons. It was held that, since, at the original

settlement of the country, no prescription to fence could exist, the common law authorizing the writ of *curia claudenda*, being inapplicable to the state of the colony, was never introduced into Massachusetts. But it was also held that, since under their statute (which closely resembles our Fence Act) adjoining owners were bound to make and maintain an equal part of the division fence, and could agree upon the parts to be made and maintained by each respectively, or in default of an agreement could procure an assignment of the part each should make and maintain, and since the country had then been settled long enough to allow the time necessary to prove a prescription, and ancient assignments or agreements might have existed and been lost, a right by prescription (which at common law was presumed to stand on a lost grant) might be set up and proved by ancient usage.

The doctrine of that case was applied in *Binney v. Proprietors*, 5 Pick. 503, and approved in *Thayer v. Arnold*, 4 Metc. 589, and in *Bronson v. Coffin*, 108 Mass. 175.

Evidence that a fence was originally erected by one owner of the land it adjoined and maintained for thirty years by his grantees was held to require a presumption of an original grant or agreement establishing a division of the fence and imposing an obligation to maintain. *Knox v. Tucker*, 48 Me. 373. A charge that if the owners of land or those from whom they derived title had, for a sufficient period, severally maintained well-defined portions of a division fence, each repairing a part and recognizing his obligation to do so, a division by prescription was established, was held correct. *Harlow v. Stinson*, 60 Me. 347.

A valid prescription by which an owner of land would become bound to maintain perpetually the whole of a division fence between him and an adjoining owner was recognized by Judge Denio in the New York Court of Appeals, but it was held that no obligation to maintain would be established by proof that one owner had maintained for any length of time an equal or just proportion of a division fence. *Adams v. Van Alstyne*, *ubi supra*.

In the courts of New Hampshire and Connecticut the power to acquire such a right in the maintenance of a division fence by user or prescription is denied, but in the latter state the common law obligation of owner to keep upon their own land their cattle no longer exists. *Glidden v. Towle*, 31 N.H. 147; *Wright v. Wright*, 21 Conn. 330.

The true doctrine upon this subject, in my judgment, lies between the extremes indicated by the decisions referred to.

A right in favor of the owner of one of two adjoining tracts of land to have the division fence perpetually maintained for the whole or a specified part of the boundary line by the owner of the other tract, may undoubtedly be created by grant or agreement. Such a right is

in the nature of an easement, and is a burden imposed on a servient tenement in favor of a dominant tenement.

Easements may be established by proof of a continuous, uninterrupted and adverse user in this state for that period of time which, by analogy, now suffices for what may yet be called prescription, viz., twenty years. *Lehigh Valley v. McFarlan*, 14 Vroom 605. Such user affords in general a conclusive presumption of a lost grant.

The difficulty in applying to the case of a boundary fence the doctrine of easements acquired by user is obvious.

The common law rule respecting the protection of lands by fences has been here modified by the statute, which imposes on owners of lands lying adjacent an obligation and duty to maintain each a just proportion of a division fence. What part each should make and maintain may be fixed by their mutual agreement or by the determination of two of the township committee, made in the manner prescribed.

When for a period of over twenty years the owner of one of two adjoining tracts has continuously, without interruption and as of duty, repaired and maintained the whole of the division fence, in my judgment a presumption would arise that he or those under whom he derived title were, as owners of a servient tenement, bound to perpetually make and maintain the fence. The existence of a former and lost agreement to do so may be inferred, and no other inference would be consistent with the circumstances.

But the difficulty arises when the owner of one tract has maintained in the manner mentioned only a part of the division fence. An obligation to perpetually maintain a specific portion of such a fence may be acquired and imposed by grant or agreement. But will the continuous maintenance for twenty years of only a part of the division fence — no grant or agreement being actually in existence — justify a presumption of an obligation to perpetually maintain that portion?

If by the statute the determination of two of the township committee fixing the portion of the division fence to be maintained by each owner is designed to fix the obligations of the owners forever without reference to subsequent changes in ownership and the introduction of new division lines, then a twenty years' maintenance of a part of the fence would justify the presumption of an obligation to maintain it, arising by an agreement or grant in respect to that part.

But such a construction of the Fence Act would, in my judgment, be indefensible. The subject of the act is the boundary fence of adjoining lands of different owners. It obliges them to maintain such a fence in just proportion, to be fixed by agreement or determination of the township committee. When one of two such adjoining tracts is subdivided by grant so that the boundary of the granted tract

adjoins that of the tract undivided, there arises a new subject for the operation of the act, viz., the boundary fence of adjoining lands of different owners. And since the act requires the fixing of a just proportion of fence to be maintained, it is plain that the original agreement or determination must cease to operate, to be replaced by a new agreement or determination in respect to the boundary which remains between the original owners. Any other construction would be opposed to the spirit of the act, and would produce great confusion and injustice. The construction does no violence to the language of the act.

The result is that the continued maintenance for any length of time of a part only of a division fence must be deemed to be referable, in the absence of proof of an express agreement, to an agreement or an assignment made under the statute, and no presumption will arise of a perpetual obligation to maintain that portion of the fence.

This was the conclusion arrived at in *Adams v. Van Alstyne*, *ubi supra*.

The construction given to the Fence Act harmonizes with the view that the agreement of adjoining owners respecting division of the fence between them may be by parol. *Ivins v. Ackerson*, 9 Vroom 220.

The contention of prosecutrix that defendant Riegel is shown by the evidence to be under a perpetual obligation to maintain the fence which was divided by the determination of the township committee cannot prevail.

The evidence shows that the lands of prosecutrix and Riegel adjoin for a distance of about one hundred and eighty-three perches. The fence which the committee divided extends for less than one hundred and eighteen perches. It is therefore only a part of the fence which the statute requires both adjoining owners to maintain. The proof that Riegel and those under whom he claims have continuously, and as if under duty to do so, maintained for over thirty years this part of the fence, does not establish a right in the nature of an easement for the continued maintenance thereof.

The proofs raise only a presumption that previously by agreement or determination the whole boundary line had been divided and the part which is now in question had been taken by or assigned to the owner of the land now Riegel's. Nor is this presumption affected by the fact that the part so maintained considerably exceeds the remainder of the boundary fence. The act requires each owner to make and amend a just proportion of the fence, and in declaring that it shall be equally divided requires regard to be had to the quantity of fence necessary, and other conveniences of fencing.

But the conclusion arrived at on the proofs is fatal to the jurisdiction of the township committee, for they establish either an agreement on the part of the owners of the Riegel tract to make and maintain the fence in question as the just proportion of the whole

boundary fence, or a previous determination to that effect under the statutes. In either case the committeemen had no right to act.

In my judgment, jurisdiction to make any determination in respect to this fence is also shown not to exist by the mere proof that it comprises only a part of the whole division fence between the lands of the parties. The act plainly contemplates a division of the whole fence, and neither party can invoke its aid to divide it by piecemeal.

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ARNOLD v. FEE.

148 N.Y. 214. 1896.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made at the June Term, 1895, which affirmed a judgment in favor of defendants, entered upon a decision of the court at Special Term, sustaining a demurrer to the complaint.

The complaint asks judgment, in substance, restraining the defendants from using a certain alley, except for the ingress and egress of themselves and persons having legitimate business with them, or the occupants of buildings upon the premises. From the allegations of the complaint, it appears that one Ulrich, owning a tract of land upon North Avenue and Franklin Street, in the city of Rochester, conveyed to one Hahn a portion thereof fronting upon Franklin Street and which was bounded upon its northwesterly side by an alley leading from Franklin Street to what were known as the Palace Stables. The northwesterly boundary line extended along the alley for 98 feet. The deed of conveyance contained the grant of "the privilege of the main alley leading to the Palace Stables, so called, as an easement for ingress and egress along the north line or alley line of the premises hereby deeded, for the distance of ninety-eight feet west from Franklin Street and no more and for no other purpose." About the time of this conveyance to Hahn, Ulrich conveyed the remainder of the tract to one Perry subject to the easement mentioned. By various mesne conveyances, the premises described in the deed to Hahn have been conveyed to the defendants and those described in the deed to Perry to the plaintiffs. At the time of the making of these deeds, a brick house stood upon the property conveyed to Hahn, some distance back from Franklin Street, with its northwesterly wall upon the line of the alley. Upon the southerly line of the alley was a sidewalk, and a door opened from the house upon it. This sidewalk led to the Palace Stables and was, also, used by the occupants of the brick house for the purpose of ingress and egress to their premises. Subsequently, the defendants erected an addition to the house, so as to extend it to Franklin Street, and the premises

were used as a restaurant, or beer garden. Later, the defendants built upon the rear thereof, professedly as an addition to the restaurant. The complaint then charges that the defendants changed the purposes for which the premises were used; that they intended to convert the same into a farmers' hotel and to make of the structure added to the rear of the original building a barn, or stable, for the accommodation of hotel customers; that the defendants claimed the right to use the whole of the alley for the ingress and egress of carriages and wagons to said barn or stable, and that such threatened use of the alley would damage the plaintiffs, who maintained upon their premises large and valuable buildings for the purpose of stabling horses and storing vehicles and which their customers reach by passing along the alley from Franklin Street.

The defendants demurred to the complaint, for insufficiency of facts to constitute a cause of action, and the demurrer was sustained at Special Term. Upon appeal by the plaintiffs to the General Term, the interlocutory judgment entered in favor of the defendants was affirmed. The plaintiffs now appeal to this court; the General Term having certified the case to be one of sufficient importance to render a decision by us desirable.

GRAY, J. The dispute between the plaintiffs and the defendants is over the true construction which is to be given to the language of the grant in the deed to Hahn, the defendants' predecessor in title, whereby an easement in the alleyway was reserved to the grantee. The grant is of "the privilege of the main alley leading to the Palace Stables, so called, as an easement for ingress and egress along the north line or alley line of the premises hereby deeded, for the distance of ninety-eight feet west from Franklin Street and no more and for no other purpose." We are asked to construe this grant as one merely of the privilege to use the sidewalk of the alleyway for ingress and egress along the line of defendants' property, and to hold that a change in the mode of the user is prohibited and would cause an extinguishment of the privilege or easement. The request assumes, and such is the argument, that with the grant of the privilege runs some limitation upon its enjoyment. This limitation is said to be found in the description of the privilege, commencing with the words "as an easement for ingress and egress, etc." These "additional words," as the learned counsel for the plaintiffs terms them, seem to furnish some ground for his argument; but, in our judgment, they cannot be so narrowly construed without importing into the language employed an element of intention, which is at variance with the apparent general purpose of the grant and which the situation of the parties at the time seems rather to deny. These words rather emphasize an intention of the original grantor that, while the alleyway might be used by the owner of the dominant tenement, that use should be confined to the purpose of passage to and from Franklin



Street and to the extent that it might be needed by the property bordering upon the way.

The language, in which the grant of the privilege of the alleyway is couched, is of too general a nature to warrant the construction that the use was to be restricted to any particular mode of ingress or egress. The words ingress and egress are as applicable to the passage of horses and carriages, as they are to the passage of foot passengers. The alleyway extended from Franklin Street to a point in the rear of the defendants' property and the concluding words of the grant, "and no more and for no other purpose," have obvious reference to the extent in length of the alleyway, which should be properly available to the defendants for the use of the same for the purpose of ingress and egress.

Nothing in the language of this grant conveys the idea of an intended limitation upon the existence and continuance of the privilege, in the event that the defendants should change the character or uses of their property bordering thereupon; so long as the alleyway is made use of for the same purpose as before, that is to say, in order to pass to and from Franklin Street. The cases of *Allan v. Gomme*, 11 Ad. & E. 759, and *Henning v. Burnet*, 8 Exch. R. 187, to which the learned counsel for the plaintiffs refers, are not authorities which conflict with the construction which we think should be given to the language of this grant. The former case related to the reservation of a right of way to a stable and the loft over the same and the space under the loft, then used as a woodhouse. Lord DENMAN, who delivered the opinion, said: "The present case does not, however, depend upon the mode of using the way, but upon the legal effect of the reservation. Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of the way to a place which should be in the same predicament as it was at the time of the making the deed." In the other case of *Henning v. Burnet*, the grant was of a way to a dwelling house, coach houses and stables, and the question was whether the defendant was justified in using the way to reach a certain field. In each case, a limitation was imposed, with respect to the privilege of the way, which is not to be found in the present case; where the grant is without any other limitation than a restriction of the use of the alley for the purposes of ingress and egress. It is unnecessary for us to say whether, if the privilege is to use a way to accomplish a certain purpose, as in the English cases, the privilege might lawfully be extended to accomplish other purposes, though not effecting a change in the mode of use of the way. That is not this case. We have here a case where the defendants are entitled to an easement in the alleyway and subject to which the plaintiffs became the owners of the adjoining property. In the general language, in which the easement was granted, we find no limitation

upon the use of the way, in so far as it is for ingress and egress. The easement cannot be extinguished by changes in the uses and occupancy of the defendants' property, by reason of which the passageway may be more frequently used by foot passengers, as well as by horses and vehicles, without importing into the language of the grant a meaning which the words, standing by themselves, do not convey. That we could not do without disregarding a principle of construction, which regards everything as passing by a grant which is necessary to its reasonable enjoyment.

We think the judgment appealed from should be affirmed, with costs; with leave, however, to the plaintiffs to amend their complaint, if so advised, within twenty days after the service of a copy of the order upon our remittitur.

All concur, except VANN, J., not sitting.

*Judgment accordingly.*

NOTE. — See, *accord*, *Abbott v. Butler*, 59 N.H. 317; *Perth Amboy Co. v. Ryan*, 68 N.J. L. 474; *Benner v. Junker*, 190 Pa. 423; *Newcomen v. Coulson*, L. R. 5 Ch. D. 133. *Cf. Wood v. Saunders*, L. R. 10 Ch. App. 582.

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### PARKS v. BISHOP.

120 Mass. 340. 1876.

BILL IN EQUITY alleging that the plaintiff was the owner of the fee in the soil and of a right of way in a passageway leading from Purchase Street by land of the plaintiff and to a shop of the defendant, which adjoined the rear of a store of the defendant on Atlantic Avenue; and praying that the defendant might be restrained from using the way as appurtenant to the land on which that store was built, or for the purpose of passing, or of carrying merchandise or other things, between that store and Purchase Street. The answer alleged that the defendant had acquired a right to such use by adverse possession.

Hearing before WELLS, J., who ordered an injunction to issue, and reserved the case for the consideration of the full court, upon a report, the material part of which is stated in the opinion.

GRAY, C.J. The report of the judge, before whom this case was heard in the first instance, states the facts proved at the hearing, and his decision that the use of the way in question by the defendant, in the manner and for the purpose complained of, was not justified by any right acquired by Lakin (under whom the defendant claims) through the use of the way by him as stated in the report, and that an injunction should issue, subject to the revision and determination of

the full court upon the question, among others, "whether Lakin, upon the facts stated, had acquired such a right of way as to constitute a good defence." The report, being on the equity side of the court, submits to our revision all inferences of fact, as well as conclusions of law. *Wright v. Wright*, 13 Allen, 207, 209; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 47.

When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. *Ballard v. Dyson*, 1 Taunt. 279. *Cowling v. Higginson*, 4 M. & W. 245. *Dare v. Heathcote*, 25 L. J. (N. S.) Exch. 245. *Williams v. James*, L. R. 2 C. P. 577. *Sloan v. Holliday*, 30 L. T. (N.S.) 757. But if the condition and character of the dominant estate are substantially altered — as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterwards turned into a manufactory or divided into building lots — the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. *Atwater v. Bodfish*, 11 Gray, 150. Willes, J., in L. R. 2 C. P. 582. *Wimbledon Commons v. Dixon*, 1 Ch. D. 362.

In the present case, the report states that for more than twenty years Lakin had, in the shop abutting upon the passageway in question, a steam engine, which was driven by boilers in the larger building on the lot behind, and was used for operating the machinery in that building, the three stories of which were respectively occupied for a blacksmith's shop, a carriage shop, and a paint shop; that there was a door in the wall between the two buildings, which was constantly used for the purpose of passing between them through the engine room and over the passageway; that the space in the passageway was occasionally used for the purpose of setting tires upon wheels, in connection with the work in the shop; that all the coal for use under the boilers was brought in through the passageway, and deposited in the basement or cellar under the engine room, until used in the regular course of business; and that the way was used generally as a back entrance or thoroughfare, as convenience required, in connection with the shops occupied by Lakin, without question or objection, for more than twenty years.

These facts appear to the court to justify and require the conclusion that Lakin had acquired by prescription a right of way for all purposes reasonably necessary for a manufactory upon the two lots,

and which, upon the buildings being destroyed by fire and rebuilt for a manufactory and storehouse, he was entitled to use for the purpose of bringing goods into the smaller building abutting upon the passageway, to be thence hoisted up into the larger building, for storage and use therein; that there has been no substantial alteration in the condition or character of the dominant estate, and no change, except in degree, in the exercise of the easement, and that for this reason the defendant has not exceeded his rights in the use of the passageway.

*Bill dismissed.*

NOTE. — In *Cowling v. Higginson*, 4 M. & W. 245, the question was as to the extent of an easement gained by adverse use. PARKE, B., said that if it was shown that the defendant had used the way whenever he required it, it was evidence from which a jury might infer a general right. "You must generalize to some extent."

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HOWELL v. KING.

1 Mod. 190. 1674.

TRESPASS, for driving cattle over the plaintiff's ground. The case was, A has a way over B's ground to Black-Acre, and drives his beasts over B's ground to Black-Acre, and then to another place lying beyond Black-Acre. And, Whether this was lawful or no? was the question, upon a demurrer.

It was urged, That when his beasts were at Black-Acre, he might drive them whither he would.

On the other side it was said, That by this means the defendant might purchase a hundred or a thousand acres adjoining to Black-Acre, to which he prescribes to have a way; by which means the plaintiff would lose the benefit of his land: and that a *prescription* presupposed a *grant*, and ought to be continued according to the intent of its original creation.

THE WHOLE COURT agreed to this. — And judgment was given for the plaintiff.

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WILLIAMS v. JAMES.

L. R. 2 C. P. 577. 1867.

DECLARATION for trespass to land.

Fifth plea, that one Ann Morgan was owner in fee of certain land, and was entitled by immemorial user to a right of way over the plaintiff's land, on foot, and with wagons, carts, and horses, to a public

highway from her said land, for the more convenient occupation thereof; that Ann Morgan demised this land with its appurtenances to one Jenkins; and that the alleged trespasses were the use of the right of way by the defendant, as the servant of Jenkins.

Issue and new assignment of excess in the user of the way.

At the trial before PIGOTT, B., at the spring assizes for Monmouthshire, the following facts were proved: Ann Morgan was owner in fee of a field called the Nine Acre Field, and of two other fields adjoining, called Parrott's land. These three fields were in the occupation of R. Jenkins. There was from time immemorial a right of way on foot, and for wagons, carts, and horses, from the Nine Acre Field over the plaintiff's land to a public highway. There was no right of way over the plaintiff's land from Parrott's land. In the summer of 1866, Jenkins mowed the Nine Acre Field and Parrott's land, and stacked all the hay upon the Nine Acre Field. In September, 1866, Jenkins sold the hay to the defendant, who carted it over the plaintiff's land to the highway, which was the alleged trespass.

The jury found, first, that there was an immemorial right of way from the Nine Acre Field to the highway; secondly, that the stacking of the hay was done honestly, and not to get the way further on; thirdly, that there was no excess in the user of the way by the defendant, apart from the question of defendant's right to cart the hay grown on Parrott's land over the plaintiff's land; plaintiff's Parrott's land hay could not be legally carried over the fifthly, if land, then damages 40s.

PIGOTT, B., directed a verdict for 40s. to be entered for the plaintiff, with leave to the defendant to move to enter the verdict for him.

BOVILL, C.J. In all cases of this kind which depend upon user, the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen. It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a *bona fide* or a mere colourable use of the right of way. That was the question in *Skull v. Glenister*, and on which the case was ultimately decided. This question is excluded here by the finding of the jury.

With respect to the purposes for which the land was used, it is agreed on both sides that that question was raised and discussed at

the trial, and the question whether there had been any excess in the user of the right of way, and also the question of the *bona fides* of Jenkins in stacking the hay, were left to the jury. The question, therefore, of what was the ordinary and reasonable use of the land, was practically left to the jury. They found that Jenkins acted honestly, and that is equivalent to finding that what had been done was done in the ordinary and reasonable use of the land to which the right of way was claimed, and in the ordinary and reasonable use of the right of way itself. It was for the plaintiff to show that there had been some excess of user on the part of the defendant, as by showing that the user of the right of way was only colourable, or that the Nine Acre Field was used for purposes other than those included in the ordinary and reasonable use of the land. The finding of the jury excludes both these questions. In considering the matters submitted to them the jury must have had to consider whether any additional burthen had been cast upon the servient tenement. This was a necessary element for them to take into consideration in deciding whether there had been only an ordinary and reasonable use of the land in question. If no additional burthen was cast upon the servient tenement the jury might well find that there had been only the ordinary and reasonable use of the right of way. On the whole, the right of way being established, and the plaintiff not showing any excess in the user, I think the defendant is entitled to the verdict, and this rule must therefore be made absolute.

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McCULLOUGH v. BROAD EXCHANGE CO.

101 N.Y. App. Div. 566. 1905.

LAUGHLIN, J. The action is brought to obtain a decree forfeiting and extinguishing the easement of the defendant, The Broad Exchange Company, for ingress and egress through an alleyway from its premises, formerly known as No. 52 Exchange Place, over an open area and plaintiffs' premises to Beaver Street. The easement was granted in a partition deed bearing date the 20th day of June, 1879, which embraced premises Nos. 38, 40, 42 and 52 Exchange Place, Nos. 25, 27 and 29 William Street, and 51 and 53 Beaver Street, and the buildings and premises in the rear. The defendant, The Broad Exchange Company, has succeeded to the title to the premises No. 52 Exchange Place and the building in the rear thereof, and the plaintiffs own the premises Nos. 51 and 53 Beaver Street. The easement related to an irregular open area in the interior of the block inclosed by the premises partitioned, all of which abutted thereon, and to a covered alleyway ten feet in width over the premises 51 Beaver Street connecting the open area with Beaver Street. It was expressly

covenanted "that for the mutual advantage of all the property" partitioned and conveyed the open area "shall be forever left as an open space, and shall be unencumbered by any erection (except such walks as now cross the same), for the purpose of giving light and air and ingress to and egress from all the premises herein described; said open spaces as they now exist shall be maintained in good order and kept in cleanly condition at the joint and equal expense of all parties hereto," and that the covenant should be held to be a covenant running with the land. The covenant with respect to the alley is that it "shall forever be left open to the present height of the same, as a means of ingress and egress for the advantage of all the property hereinbefore conveyed and partitioned." It appears that at the time the partition deed was executed there were two low brick buildings on the premises known as No. 52 Exchange Place, the one fronting on the street covering the lot to the depth of 107 feet and the one in the rear being 34 feet in width, covering the lot within a few inches, and 116 feet in length. Both of these were office buildings. Prior to the commencement of the action the defendant, The Broad Exchange Company, became the owner of four lots known as Nos. 44, 46, 48 and 50 Exchange Place lying immediately to the east of its premises No. 52 Exchange Place, having an aggregate frontage of about 89 feet and 6 inches and extending in depth 102 feet and 4 inches, and of several irregular lots adjoining No. 52 Exchange Place on the west known as Nos. 54 and 56 Exchange Place and Nos. 25, 27, 29, 31 and 33 Broad Street, having an aggregate frontage on Exchange Place of about 124 feet and 9 inches and of 106 feet and 8 inches on Broad Street. None of these lots except said No. 52 Exchange Place was embraced in the partition deed or had appurtenant to it any right or interest in the covenants or easements mentioned in the partition deed. These several lots together formed practically a parallelogram 236 feet long on Exchange Place and 106 feet wide on Broad Street with the addition of the lot about 34 feet wide by 116 feet deep in the rear of the center of the parallelogram, it being the lot in the rear of No. 52 Exchange Place and entitled to the enjoyment of the easement in connection therewith and for brevity in the opinion it will be deemed part of and referred to as No. 52 Exchange Place. The Broad Exchange Company is a New Jersey corporation, and after acquiring title to these lots and about the 1st day of May, 1900, it caused plans to be prepared for the erection of a single office building thereon, twenty stories in height with front entrances on Broad Street and Exchange Place and a door in the rear opening upon that part of the premises which was dominant to the easement upon the rear courtyard or open space referred to in the said partition deed. This building was designed for the accommodation of about seven thousand occupants, and was to have eighteen passenger elevators and a common heating and power plant for all. The building was

constructed in accordance with the plans by the defendant George A. Fuller Company for the Broad Exchange Company, and prior to the trial of the action it was completed and opened for the reception and occupation of tenants. The boiler and machinery for heating the building and operating the elevators are in that part of the premises appurtenant to the easement, but the heat and power are distributed into those parts of the building beyond the lines of the original lot No. 52 Exchange Place, which alone was dominant to the easement. It is found by the court that the building was erected without regard to the lines of lot No. 52 Exchange Place, and that it was designed as one concrete structure with connecting halls and stairways throughout, and with interdependent relations between its various parts. The office space in that part of the building standing upon the lot formerly known as No. 52 Exchange Place constitutes only one fifth of the entire office space of the building. The average consumption of coal for the generation of heat and power in the building is between twenty and twenty-three tons per day. When the building was planned it was intended that the coal should be brought in through this alley and across the open area and transmitted to the furnace room through coal chutes, and this course has been taken. The ashes from the furnace were designed to be and are removed over the area-way and through the alley. Each of the eighteen passenger elevators affords access to any part of the building, and eight of them are entirely upon the original dominant lot and seven others are partly over it. The waste paper, sweepings and refuse from the entire office building are deposited in bins near the door opening into the open area referred to and removed via the alley. Employees and tenants of all parts of the building may use the doorway opening upon the area at will for passing out to Beaver Street or to the building from Beaver Street, and some of them avail themselves of the opportunity thus afforded for using the area and alley. The trial court has found that by thus constructing and using the office building the appellant owner has "so materially changed the condition of the originally dominant tenement as to increase the burden of the servitude upon the servient tenement of the plaintiffs, and to subject the servient tenement to the service of premises other than the premises originally dominant." . . .

Where the nature and extent of the use of the easement is, as here, unrestricted, the use by the dominant tenement might, of course, be enlarged or changed (*Allan v. Gomme*, 11 Ad. & El. 759; *Arnold v. Fee*, 148 N.Y. 214; *Gillespie v. Weinberg*, Id. 238; *Dand v. Kingscote*, 6 M. & W. 173; *Sloan v. Holliday*, 30 L. T. Rep. [N.S.] 757); but the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant. *Williams v. James*, L. R. 2 C. P. 577. It is manifest, therefore, that although the appellant as owner



of the dominant tenement might have lawfully devoted it to a use that would have authorized and required a greater burden on this easement and right of way than has now been imposed, yet the tenants of those parts of the building not erected upon the premises No. 52 Exchange Place have no right to use the easement and the owner has no right to enlarge the use of the easement for the benefit of those parts of his office building which are upon premises other than the dominant tenement. This applies to the removal of ashes, sweepings and refuse as well as to bringing coal. It is not needful to inquire whether the owner of the dominant premises might establish thereon a plant for developing heat, light or power and transmitting the same to other premises for hire and thus subject the right of way to a more extensive use than that to which it is now put. That might be a question of law and it might be a question of fact depending on the reasonableness of the use. *Williams v. James, supra*. The case is not analogous to the present situation. The coal and the heat and power generated thereby are used directly for the benefit of the dominant tenement and adjacent premises of the appellant owner. It is no different in principle than if there were separate power plants and the coal was passed over the dominant tenements for use on the other premises which the appellant clearly would have no right to do. *Skull v. Glenister*, 16 C. B. [N.S.] 81; *Davenport v. Lamson*, 38 Mass. [21 Pick.] 72; *Webster v. Bach*, Freem. 247; *Lawton v. Ward*, Ld. Raym. 75.

NOTE. — This decision was affirmed by the Court of Appeals. 184 N.Y. 592.

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### BAKEMAN v. TALBOT.

31 N.Y. 366. 1865.

THE action is in the nature of a bill in equity to establish a right of way claimed by the plaintiff over the land of the defendant, and to enjoin the latter from continuing certain fences which he had erected, and to compel him to remove them. A farm, of which the premises owned by the plaintiff and those owned by the defendant are parcels, embracing a certain lot No. 179, was formerly owned by one De Groot, who died intestate in 1838, leaving children, to whom the land descended. Partition was made between them by suit in chancery in the year 1839. The commissioners appointed by the court to make partition divided the farm into several smaller lots, and allotted the one numbered 12 to the party under whom the plaintiff derived title by a subsequent conveyance. Lots numbers 9, 10, and 11 were set off to parties under whom the defendant subsequently

acquired title. The four lots were wood lots, and lay adjoining each other, and are bounded on the north by the northerly line of the original farm, the plaintiff's being the easternmost of the four lots. There is a public highway running westerly of the lots. The report of the commissioners (which was confirmed by the court) contains the following provision: "The right of way or passage is reserved to the said heirs respectively, and to their heirs and assigns, from the highway, near the west line of said lot number 179, and immediately adjoining the north line of the farm aforesaid, and extending east along the north line of said farm to the extreme east corner of the wood lots aforesaid, to enable them to pass to and from their respective wood lots for the purpose of obtaining wood and timber therefrom, or for any other purpose." The plaintiff's lot remained unimproved, but the defendant's had been cleared and were under cultivation. The defendant, before the commencement of the suit, had built a fence between his easternmost lot and the plaintiff's lot, and also fences between each of his other lots, each fence running quite to his northerly line. Two of the fences were built with stakes, "with rails to slip between them like bars." The other was of rails, and had what is called in the case a "slip gate" at the northerly end, which was the place he passed, so that the rails could be taken out and turned round, and so that the plaintiff could pass through. After the commencement of the suit, the defendant put up bars on the lines of three of the lots. The plaintiff's premises being a wood lot, he had no occasion to use the reserved passageway except at long intervals.

The plaintiff claimed that the defendant ought to have placed gates at the place of passage, but this the defendant refused to do, upon which the plaintiff threatened to leave the fences down, and the defendant threatened him with personal violence if he should do so.

The judge (Hon. DANIEL PRATT, before whom the case was tried without a jury), after stating the foregoing particulars as conclusions of fact, determined, that although the plaintiff was entitled to a right of passage over the defendant's land at the place indicated, yet that the maintaining the fences there was not an obstruction which the plaintiff was entitled to have removed. Judgment was accordingly given in favor of the defendant, with costs, upon which the plaintiff prosecuted this appeal.

The case was submitted on printed points.

DENIO, Ch.J. No question is made but that the plaintiff is entitled to a right of way or passage across the north end of the defendant's land. The extent of that right, and the duty of the respective owners towards each other, is to be determined by the language of the reservation and the circumstances of the case. The plaintiff insists, in substance, that the defendant was bound to keep open a narrow road or lane across the north end of his land, or if he will not

do this, that he should, at least, insert swinging gates in his fences which might be opened and shut with ease whenever the plaintiff had occasion to pass. What the defendant did, as I understand the testimony and the judge's conclusions, was to subdivide his land in the manner which he found convenient for its occupation, running the fences quite to his northerly line, making arrangements, however, at the place indicated for passage, by which the bars or rails could be readily removed and conveniently replaced when the plaintiff should have occasion to go through. This would no doubt be somewhat less beneficial to the plaintiff than either a clear space like a common road, or a series of gates which could be opened and shut like doors. But it would be much less onerous to the defendant, who, upon the plaintiff's position, would have to forego the use of a considerable strip of land, and, in addition, to build a lateral fence across the whole north end of the premises, or to incur considerable expense in erecting gates. I am of opinion that the defendant's position presents the more reasonable view of the case. The main object of the reservation in the commissioner's report was to enable those of the proprietors who should become the owners of the lots most remote from the highway to go upon and pass over the land of the others situated between them and the highway, without committing a trespass, and to define the direction of such passage. We are not to intend that it was designed to make the burthen unnecessarily onerous. The circumstance that the land was wholly in forest, and that the primary purpose indicated was the carrying of wood and timber, do not suggest the necessity of a thoroughfare like a highway, or an unimpeded private way. If the passage was made as convenient as the mode of access which a farmer usually provides for himself, to get to and from his wood land, it seems to me that the purposes of the reservation would be confirmed. De Groot formerly possessed the whole farm. It was about to be subdivided and assigned in severalty to different owners. It would be improper that those to whom back lots were assigned should be precluded from getting to the highway except by committing a trespass, or by claiming a way by necessity, a right but little known and not of convenient application. Moreover the exigencies of the case did not contemplate a constant use of the passage, but only such an occasional use as the resort to wood land would require, and such as the plaintiff has since exercised. There is no reason to believe that if the plaintiff, besides owning the back wood lot, had also been the proprietor of the intervening cleared land, he would have found it necessary or thought it expedient to have fenced out a lane, or have erected these gates for his use in passing to and from his timber land, and if he would not have done so it is unreasonable to require it of the defendant. The defendant certainly has no right to preclude the plaintiff from availing himself of the right of passage, or to render the exercise of that right unusually or unreasonably diffi-

cult or burthensome. I think he is not shown to have done so. It must be kept in mind that the plaintiff's lot is still wood land. It may remain so for many years; but it may be cleared up and cultivated, and have buildings erected on it and be applied to such uses as to require constant and frequent passage between it and the highway. There is nothing inconsistent in holding that the present arrangements are suitable and sufficient under existing circumstances; and after these circumstances have changed, and the question shall arise as to what shall then be proper, to determine that a passage perpetually open or a system of gates better adapted to such increased use than the present fences and bars, shall be required of the defendant. It would not be right at this time to oblige the defendant to furnish facilities for a state of affairs which may never arise, or which may not arise until some remote period. The doctrine that the facilities for passage, where a private right of way exists, are to be regulated by the nature of the case and the circumstances of the time and place, is very well settled by authority. *Hemphill v. The City of Boston*, 8 Cush. 195; *Cowling v. Higginson*, 4 Mees. & Wels. 245. The last case determines, in effect, that the extent of the privilege created by the dedication of a private right of passage depends upon the circumstances, and raises a question for the determination of a jury. If, therefore, in the present case I felt less confidence in the conclusion I have stated than I do, I should hold the question had been settled by the judge sitting in the place of a jury in a manner that we could not disturb.

The judgment should be affirmed.

NOTE. — See, accord, *Hoyt v. Hart*, 149 Cal. 722; *Tacoma Safety Deposit Co. v. Chicago*, 247 Ill. 192 (owner of the fee of land subject to a public easement for street purposes may excavate beneath the sidewalks and use the space so made); *Atkins v. Bordman*, 2 Met. (Mass.) 457; *Thompson v. Germania Life Insurance Co.*, 97 Minn. 89; *Duross v. Singer*, 224 Pa. 573. Cf. *Attorney-General v. Williams*, 140 Mass. 329.

## CHAPTER III.

## LICENSES.

## THOMAS v. SORRELL.

Vaughan, 330. 351.

A DISPENSATION or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. As a license to go beyond seas, to hunt in a man's park, to come in to his house, are only actions, which without license, had been unlawful.

But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed, and tree cut down, they are grants.

## WOOD v. LEADBITTER.

13 M. & W. 838. 1845.

ALDERSON, B. This was an action tried before my Brother ROLFE at the sittings after last Trinity Term. It was an action for an assault and false imprisonment. The plea (on which alone any question arose) was, that at the time of the alleged trespass the plaintiff was in a certain close of Lord Eglintoun, and the defendant, as the servant of Lord Eglintoun, and by his command, laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence. Replication, that, at the time of such removal, the plaintiff was in the said close by *the leave and license of Lord Eglintoun*. The leave and license was traversed by the defendant, and issue was joined on that traverse. On the trial it appeared that the place from which the plaintiff was removed by the defendant was the inclosure attached to and surrounding the great stand on the Doncaster race-course; that Lord Eglintoun was steward of the races there in the year 1843; that tickets were sold in the town of Doncaster at one guinea each, which were understood to entitle the holders to come into the stand, and the inclosure surrounding it, and to remain there every

day during the races. These tickets were not signed by Lord Eglintoun, but it must be assumed that they were issued with his privity. It further appeared, that the plaintiff, having purchased one of these tickets, came to the stand during the races of the year 1843, and was there or in the inclosure while the races were going on, and while there, and during the races, the defendant, by the order of Lord Eglintoun, desired him to depart, and gave him notice that if he did not go away, force would be used to turn him out. It must be assumed that the plaintiff had in no respect misconducted himself, and that, if he had not been required to depart, his coming upon and remaining in the inclosure would have been an act justified by his purchase of the ticket. The plaintiff refused to go, and thereupon the defendant, by order of Lord Eglintoun, forced him out, without returning the guinea, using no unnecessary violence.

My Brother ROLFE, in directing the jury, told them, that, even assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, still it was lawful for Lord Eglintoun, without returning the guinea, and without assigning any reason for what he did, to order the plaintiff to quit the inclosure, and that, if the jury were satisfied that notice was given by Lord Eglintoun to the plaintiff, requiring him to quit the ground, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed, during which he might conveniently have gone away, then the plaintiff was not, at the time of the removal, on the place in question *by the leave and license of Lord Eglintoun*. On this direction the jury found a verdict for the defendant. In last Michaelmas Term, Mr. Jervis obtained a rule nisi to set aside the verdict for misdirection, on the ground, that, under the circumstances, Lord Eglintoun must be taken to have given the plaintiff leave to come into and remain in the inclosure during the races; that such leave was not revocable, at all events without returning the guinea; and so that, at the time of the removal, the plaintiff was in the inclosure by the leave and license of Lord Eglintoun. Cause was shewn during last term, and the question was argued before my Brothers PARKE and ROLFE and myself; and on account of the conflicting authorities cited in the argument, we took time to consider our judgment, which we are now prepared to deliver.

That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established, that it would be mere pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite.

And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on

## CHAPTER III.

LICENSES.

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## THOMAS v. SORRELL.

Vaughan, 330, 351.

A DISPENSATION or license properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful. As a license to go beyond seas, to hunt in a man's park, to come in to his house, are only actions, which without license, had been unlawful.

But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed, and tree cut down, they are grants.

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And although the older authorities speak of incorporeal *inheritances*, yet there is no doubt but that the principle does not depend on



the quality of interest granted or transferred, but on the nature of the subject-matter: a right of common, for instance, which is a profit à prendre, or a right of way, which is an easement, or right in nature of an easement, can no more be granted or conveyed for life or for years without a deed, than in fee simple. Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through and to remain in a certain close belonging to Lord Eglintoun; to go and remain where if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land, — it is a right of way and something more: and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed. The plaintiff, however, in this case argues, that he is not driven to claim the right in question strictly as *grantee*. He contends, that, without any grant from Lord Eglintoun, he had license from him to be in the close in question at the time when he was turned out, and that such license was, under the circumstances, irrevocable. And for this he relies mainly on four cases, which he considers to be expressly in point for him, viz., *Webb v. Paternoster*, reported in five different books, namely, Palmer, 71; Roll. 143 and 152; Noy, 98; Popham, 151, and Godbolt, 182; *Wood v. Lake*, Sayer, 3, *Taylor v. Waters*, 7 Taunt. 374, and *Wood v. Manley*, 11 Ad. & E. 34; 3 Per. & D. 5.

As the argument of the plaintiff rested almost entirely on the authority of these four cases, it is very important to look to them minutely, in order to see the exact points which they severally decided.

Before, however, we proceed to this investigation, it may be convenient to consider the nature of a license, and what are its legal incidents. And, for this purpose, we cannot do better than refer to Lord C.J. VAUGHAN's elaborate judgment in the case of *Thomas v. Sorrell*, as it appears in his Reports. The question there was as to the right for the Crown to dispense with certain statutes regulating the sale of wine, and to license the Vintners' Company to do certain acts notwithstanding those statutes.

In the course of his judgment the Chief Justice says (Vaughan, 351), "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting

and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing my wood, and warming him, they are licenses; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and in the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

Now, attending to this passage, in conjunction with the title "License" in Brooke's Abridgment, from which, and particularly from paragraph 15, it appears that a license is in its nature revocable, we have before us the whole principle of the law on this subject. A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident.

It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, coupled with a grant, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the license is a mere license; it is not an incident to a *valid* grant, and it is therefore revocable. Thus, a license by A to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice VAUGHAN, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a license annexed to come on the land: and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse, and the license remains a mere license, and therefore capable of being revoked. On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the license would be irrevocable.

Having premised these remarks on the general doctrine, we will proceed to consider the four cases relied on by Mr. Jervis for the plaintiff.

[The learned judge, after reviewing the authorities, announced

that the court was of opinion that the direction given to the jury at the trial was correct.]

NOTE. — *McCrea v. Marsh*, 12 Gray (Mass.) 211. The plaintiff bought a ticket to a theatre, but, on the ground of his color, was not permitted to enter. The court held that by the purchase of the ticket the plaintiff had secured only a revocable license and that, after it was revoked, his attempt to enter the theatre was unwarranted. In *Burton v. Scherpf*, 1 All. (Mass.) 133, a like decision was reached, where the plaintiff was requested to leave, after he had entered but before he had taken his seat.

The doctrine that a theatre ticket gives only a revocable license was approved in *People v. Flynn*, 189 N.Y. 180, 185; *Horney v. Nixon*, 213 Pa. 20. (Cf. *Drew v. Peer*, 93 Pa. 234.) The law was made otherwise by statute in California. See *Greenberg v. Western Turf Association*, 140 Cal. 357.

Doubt has recently been cast by an English court on the authority of the principal case. See *Hurst v. Picture Theatres (Limited)*, decided in November, 1913, and reported in 30 Times Law Reports 98 (the case was not inserted in the official reports). The plaintiff claimed that he purchased a ticket. The defendant claimed that he took a seat without having purchased a ticket. The jury found for the plaintiff on this question. The plaintiff, after he had taken a seat, was requested to leave, and, upon his refusing to leave, was ejected. The jury assessed the damages at £150. Mr. Justice CHANNELL said that he had come to the conclusion that the case of *Wood v. Lead-bitter* was now obsolete, on the ground that there was now a contract between the theatre proprietors and the taker of a seat, without the necessity for a seal. And if the seat-holder had paid for his seat and behaved himself quietly he had a right to see the show. It might be called an equity, but, whatever it was, the visitor was entitled to retain his seat so long as he behaved himself and kept within the regulations laid down by the management.

In *Miller v. State*, 39 Ind. 267, the court held that if A gave B, for a valuable consideration, a license to enter on A's land and gather corn, but later forbade B to enter, B's entry to gather the corn was lawful.

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### COOK v. STEARNS.

11 Mass. 533. 1814.

TRESPASS *quare clausum fregit*. The defendant, as to the breaking and entering the plaintiff's close in the declaration mentioned, and digging up the soil thereof, pleads in bar, that long before the plain-

tiff had anything in the said close, viz. on the 1st of September, 1805, he the said Stearns was, and continually hitherto hath been, and still is, lawfully possessed of a certain other close, situate in, &c., and being near to the plaintiff's close; on which said other close of him the said Stearns there had been theretofore erected a certain water mill, and also part of a certain mill dam and embankment, made for the purposes of forming a basin or canal, and thereby raising a sufficient head of water for working said mill; and that a certain other part of the same mill dam and embankment was then and there made in and upon the plaintiff's said close, in which, &c., *by and with the consent legally obtained of Nehemiah and Eliakim Estabrook*, who were then and there lawfully seized of the same: which said mill dam and embankment, so made for the purpose aforesaid, it always hath been necessary, and at the time of the supposed trespass it was necessary to keep and maintain in repair, in order to raise a sufficient head of water for working said mill to the best advantage: — and that at the said time when, &c., a part of the said dam and embankment situate in the said close of the plaintiff was broken and cut through for the space of twelve feet, and that the said basin or canal was obstructed and filled with stones and gravel, whereby the water therein, which used and of right ought to flow to the said mill, and which was necessary for the working thereof, was wholly diverted therefrom, so that the same mill could not be wrought. — Wherefore the defendant, at the time when, &c., entered the said close of the plaintiff, for the purpose of removing the said obstructions, and repairing the said dam and embankment, which he accordingly did, in order to raise a sufficient head of water for working said mill, as it was lawful for him to do for the cause aforesaid: and in so doing did necessarily dig up a little of the soil of the said close, doing no damage to the plaintiff on that occasion: which is the same trespass, &c.

To this plea the plaintiff demurs, assigning the following causes of demurrer: 1. That it does not appear by the said plea, that the said Stearns, by any legal or sufficient conveyance, ever acquired or had any permanent or good right or authority to keep up or repair said dam, or to enter upon the said close for that or any other purpose. 2. That it does not appear by said plea, that the said stream or water course was an ancient stream or water course; or that the said Stearns had any right to flow the same over the said close. And the defendant joins in demurrer.

PARKER, C.J. The question presented by the demurrer and joinder in this case is, whether the facts set forth in the plea in bar amount to a justification of the trespass complained of in the declaration.

The possession of the *locus in quo* is admitted to be in the plaintiff; and no title to it is claimed by the defendant in his plea. But he claims a right to enter upon it, for the purpose of repairing the dam

and bank, and clearing the canal from obstructions; because those, whose estate the plaintiff now holds, permitted him to enter and make the bank, and dig the canal; from which permission he would infer a right to enter and use the soil as often as the state of the mill owned by him should require it. He has not described the mill as ancient, nor set up any prescriptive right to an easement in the close of the plaintiff: but alleges that he had the *consent, legally obtained*, to erect his works, of the former owner of the close; and because of that consent, the works being out of repair, he entered to make the necessary repairs.

It is evident, therefore, that the defendant claims a permanent interest in the plaintiff's close, a right to maintain the bank, dam and canal, which he formerly placed there by consent, and to enter upon the plaintiff's close at any time to make necessary repairs. — Now this is an interest in land, which cannot by our statute of 1783, c. 37, pass without deed or writing; for all interests in land, according to that statute, whether certain or uncertain, are declared to be estates at will, unless the evidence of them exists in deed or writing; and if a continuation of the interest is intended for seven years, it must not only be passed by deed, but the deed must be acknowledged and registered, in the same manner as is required in the transfer of a fee.

The defendant not having alleged that he acquired the right, which he claims, by deed or writing, his plea is for that cause bad. After a verdict, perhaps, this defect would be cured: because it would be presumed that the evidence, which the law requires to establish such an interest as is claimed, had been exhibited: but on demurrer, where a right in land is set up as a satisfaction for a trespass, the manner in which that right was acquired should be averred, that the court may immediately determine whether it was a lawful conveyance of the right or not.

But the counsel for the defendant, aware that they could not set up any estate of a permanent nature in the plaintiff's close, without averring and proving a deed or some other lawful conveyance, have considered the facts alleged in his plea as amounting to a license, given him by the former owner of the land, to make the dam, bank and canal: and they have contended, first, that such license may be by parol: and secondly, that it is not in its nature countermandable; from which they would infer that a right continues in him to maintain the dam, &c., and to enter upon the plaintiff's close to repair them *toties quoties*, &c.

This argument had some plausibility in it, when it was first stated; but upon more mature consideration it seems to have no foundation in principles of law.

A license is technically an authority given to do some one act, or a series of acts on the land of another, without passing any estate in the land. Such as a license to hunt in another's land, or to cut down a

certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. See Viner's Abridgment, title License, A. E. D. G. and the authorities therein cited, which have been examined and found to support the positions laid down by the compiler. It is also holden that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses, which in their nature amount to the granting of an estate for ever so short a time, are not good without deed, and are considered as leases, and must always be pleaded as such.

The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law, which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute. If the defendant had a license from the former owners of the plaintiff's close, to make the bank, dam and canal in their land, this extended only to the act done, so as to save him from their action of trespass for that particular act: but it did not carry with it an authority, at any future time, to enter upon the land. As to so much of the license as was not executed, it was countermandable; and transferring the land to another, or even leasing it, without any reservation, would of itself be a countermand of the license. For although, when one is permitted to do certain things upon the land of another, an implied authority is given to enter upon the land to do the thing, and to repair it, if it is of a permanent nature; yet the first permission or license must be by grant, in order to draw after it this consequence.

We are also all satisfied, that the plea is in this respect bad; it not shewing such a license as may be pleaded, and indeed the interest claimed being not in the nature of a license, but of an estate, or at least an easement in the land, which cannot be acquired without writing or prescription, or such a possession or use as furnishes presumption of a grant: neither of which is averred in this plea.

If the defendant's plea were held to be a bar to the action, all the mischiefs and uncertainties, which the legislature intended to avoid by requiring such bargains to be put in writing, would be revived; and purchasers of estates would be without the means of knowing whether incumbrances existed or not on the land which they purchase.

The defendant's plea is adjudged bad.

NOTE. — For other authorities that a license is not effective against the grantee of the licensor, see *Jenkins v. Lykes*, 19 Fla. 148; *Kamp-*

*house v. Gaffner*, 73 Ill. 453; *Houx v. East*, 26 Mo. 178; *Vollmer's Appeal*, 61 Pa. 118.

*Drake v. Wells*, 11 All. (Mass.) 141. A, owner of land, for a valuable consideration gave a license to B to enter and cut timber, and retain such timber for his own use. A then conveyed the land to C, who had notice of the license. It was held that the license was not effective against C.

*Bruley v. Garvin*, 105 Wis. 625. A, owner of land, for a valuable consideration gave a license to B to enter and cut timber, and retain such timber for his own use. A then contracted to sell the land to C. It was held that this contract terminated the license even if B had no notice of the contract. The court said (p. 629): "A parol license to cut timber on the licensor's land is simply authority to do certain acts upon another's land. It is gone if the licensor deed the land to another, or if either party die. The authority is ended by the transfer of the title or by the fact of death, and no notice thereof is necessary." Cf. *Dame v. Dame*, 38 N.H. 429, 432.

A license is terminated by the death of either the licensor or licensee, and is not assignable. *Prince v. Case*, 10 Conn. 375; *Blaisdell v. Portsmouth Railroad*, 51 N.H. 483.

## WOOD v. MANLEY.

11 Ad. & E. 34. 1839.

TRESPASS for breaking and entering plaintiff's close.

Plea (besides others not material here), as to entering the close, that defendant, before the time when, etc., was lawfully possessed of a large quantity of hay, which was upon plaintiff's close in which, etc., and that defendant, at the times when, etc., by leave and licence of the plaintiff to him for that purpose first given and granted, peaceably entered the close, to carry off the said hay, and did then and there peaceably take his said hay from and out of the said close, as he lawfully, etc., which are the said alleged trespasses, etc. Replication, *de injuria*.

On the trial, before ERSKINE, J., at the last Somersetshire assizes, it appeared that the plaintiff was tenant of a farm, including the *locus in quo*; and that, his landlord having distrained on him for rent, the goods seized, comprehending the hay mentioned in the plea, were sold on the premises; the conditions of the sale being, that the purchasers might let the hay remain on the premises till the Lady-day following (1838), and enter on the premises in the mean while, as often as they pleased, to remove it. The defendant purchased the hay at the sale: and evidence was given to shew that the plaintiff was a party to these conditions. After the sale, on 26th January, 1838,

plaintiff served upon defendant a written notice not to enter or commit any trespass on his, the plaintiff's, premises. In February following, defendant served plaintiff with a written demand to deliver up the hay, or to suffer him, defendant, to have access thereto and carry it away; threatening an action in default thereof. The plaintiff, however, locked up the gate leading to the *locus in quo*, where the hay was; and the defendant, on 1st March, 1838, broke the gate open, entered the close, and carried away the hay. The learned judge told the jury that, if the plaintiff assented to the conditions of sale at the time of the sale, this amounted to a licence to enter and take the goods, which licence was not revocable: and he therefore directed them to find on this issue for the defendant, if they thought the plaintiff had so assented. Verdict for the defendant.

LORD DENMAN, C.J. Mr. Crowder's argument goes this length; — that, if I sell goods to a party who is, by the terms of the sale, to be permitted to come and take them, and he pays me, I may afterwards refuse to let him take them. The law countenances nothing so absurd as this: a licence thus given and acted upon is irrevocable.

NOTE. — See, *accord*, *Long v. Buchanan*, 27 Md. 502; *Heath v. Randall*, 4 Cush. (Mass.) 195.

In *Wood v. Leadbitter*, *supra*, ALDERSON, B., commenting on the principal case, said (p. 853): "This was a case not of a mere license, but of a license coupled with an interest. The hay, by the sale, became the property of the defendant, and the license to remove it became, as in the case of the tree and the deer, put by C.J. VAUGHAN, irrevocable by the plaintiff."

Similarly, if for a valuable consideration a license has been given to enter and cut timber for the licensee's use, and the licensee has entered and cut timber, the title to such timber is in the licensee, and although the licensor forbid him to enter to remove it, the licensee is not a trespasser when he enters for such purpose. *Nettleton v. Sikes*, 8 Met. (Mass.) 34.

Similarly, where the licensor, who had been a postmaster, gave permission to his successor to enter upon his land to take personal property to the possession of which the successor was entitled by virtue of his office. *Sterling v. Warden*, 51 N.H. 217.

Similarly, if the licensor permit the licensee to place a chattel, belonging to the licensee, upon the land of the licensor, and the licensee so places his chattel, he is not a trespasser when he enters to remove it, although the licensor has forbidden his entry. *Giles v. Simonds*, 15 Gray (Mass.) 441, 442.

It is submitted that it is consistent with the authorities, and that it is desirable, to confine the doctrine of licenses "coupled with an interest" to cases where the license is to be upon the land of the licensor for the purpose of removing a chattel to the possession of which the licensee is entitled.



A license coupled with an interest is assignable. It has been held that a license to cut and remove timber may be assigned before the timber is cut. See *Basset v. Maynard*, Cro. Eliz. 819; *Heflin v. Bingham*, 56 Ala. 566; *Sawyer v. Wilson*, 61 Me. 529.

The authority is scant on the question whether a license coupled with an interest is effective against a grantee of the licensor. In *Yale v. Seely*, 15 Vt. 221, the license was declared to be effective against a person who had contracted to purchase the land, without notice of the license, and had been let into possession. In *Jenkins v. Lykes*, 19 Fla. 148, the licensee cut timber, and, after the licensor had transferred the land, entered and removed it. The court held (p. 160) that it was error to allow the grantees to recover the value of the lumber "even if they could have an action of trespass to recover nominal damages for going on the land to get the timber."

It is submitted that a license, even if coupled with an interest, is not an interest in the land, and therefore should not be effective against the grantee of the licensor. If the grantee of the licensor refuses either to deliver the chattel, or to allow an entry for its removal, it seems that he converts the chattel. See *Nichols v. Newson*, *supra*, and cases cited in the note on p. 333. The rights of the owner of the chattel are thus sufficiently protected.

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LEHIGH R.R. CO. v. BANGOR RY. CO.

228 Pa. 350. 1910.

OPINION BY MR. JUSTICE ELKIN.

The appellee company sought and obtained an injunction in the court below to restrain appellant from crossing its tracks at grade. Both companies are domestic corporations organized and created to operate lines of steam railroad under the act of 1868. The Northampton Railroad Company, no longer existing and not a party to this proceeding, was also incorporated for the same purpose under the same act. In 1903, the last-named company entered into an agreement in writing with the appellant company granting the right to cross its tracks at grade upon the conditions and regulations stipulated therein. This agreement was not recorded and therefore subsequent purchasers, owners or successors in title, were not affected with constructive notice of any right, privilege or interest claimed under it. Soon after the execution of this agreement all the rights, privileges, franchises and property of the Northampton company passed to appellee company by merger under the act of 1901. At the time of the merger the crossing had not been constructed and no attempt had been made to assert any rights or privileges under the agreement. When the merger proceedings were completed in 1903, the

Northampton company passed out of legal existence and is no longer a corporate entity. In 1909, nearly six years subsequent to the grant relied on, and almost as long after the grantor company had ceased to exist, the directors of appellant company by resolution approved, ratified and adopted the line, survey and location of the branch and crossing contemplated in the original agreement and authorized the construction of the same. This was the first step taken to assert any right or privilege under the agreement and it was taken many years after one of the contracting parties had passed out of existence. It is contended that this burden followed the merger and must be borne by the company succeeding to the rights thus obtained. This depends largely upon the grant itself and the nature of the privilege or interest granted. Was it a mere license to cross or was it an easement running with the land? The learned court below after full consideration held it to be a license and not an easement, and this conclusion is concurred in here. A license in respect to real estate has been defined to be an authority to do a particular act or series of acts on the land of another without possessing an estate or interest therein, while an easement always implies an interest in the land in or over which it is to be enjoyed. In the grant of an easement two distinct elements are involved, a dominant tenement to which the right is appurtenant, and a servient tenement upon which the servitude is imposed. A license is in the nature of a personal privilege and may be revoked before any rights have been asserted under it, or money expended on the faith of the privilege granted. The dividing line between a license and an easement is frequently somewhat obscure and not easily distinguished. The distinction must of necessity depend upon the interpretation of the terms of the grant. If an easement be granted in terms, or by language from which such an interest under settled rules of construction is implied, the covenants will be accordingly enforced. Where the language used is of doubtful import it is for the court to construe the instrument and determine whether the grant is of a permanent interest running with the land, or only a personal privilege affecting the rights of the parties. In the present case it is doubtful, to say the least, whether there is in any proper legal sense both a dominant and servient tenement to make the doctrine of easements applicable at all. The contracting parties, two railroad companies, were not dealing about lands, or estates or interests in land, but confined their negotiations and agreement to the privilege of crossing tracks. The words of the grant are, "The party of the first part hereby grants to the party of the second part the right to cross with single track the tracks of the party of the first part." The thing granted was the privilege of crossing tracks and no words are used indicating an intention to grant an interest in land. The agreement is silent as to how long the privilege was to be enjoyed and we fail to find anything contained therein to indicate an inten-

tion to grant an interest running with land. The grant is only to the party of the second part, not to its successors and assigns. No words are used to suggest a grant in perpetuity, such as "at all times," or "hereafter forever," or to "its successors and assigns forever," or any other like phrases, which have been held in some cases to create an easement. There is nothing in the language of the covenant, nor in the parties to the agreement, to indicate anything more than the grant of a privilege in the nature of a license by the party of the first part to the party of the second part to cross its tracks at grade. The second party failed to exercise the privilege during the corporate existence of the party granting it, and made no attempt to do so for nearly six years after the rights, privileges and franchises of the party of the first part had passed to the appellee company under the merger proceedings. It is doubtful whether the privilege thus granted was a debt, liability or duty imposed upon the consolidated company within the meaning of the act of 1901, but even if it was, the nature of the obligation was not changed by the merger, and the character of the privilege remained the same after the merger as before it took place. It was at all times a revocable privilege until moneys had been expended, or work had been done on the faith of it, and nothing of this kind had been done up to the time of filing this bill. It being a license or privilege to cross tracks, and not an easement running with land, the right of revocation ran with the grant and could be exercised at any time before execution. The suggestion of the learned court below that the license not having been executed was revoked by the merger we are inclined to think is entirely sound, but whether it was so revoked or not, the right of revocation at least followed the merger and the filing of this bill to restrain the construction of the crossing is a sufficient notice and exercise of such revocable act. While other interesting questions have been considered and discussed by the court and counsel no useful purpose will be served by going over this ground, because if the grant relied on is a mere license, and the court below and here so hold, that is an end of the case. Our own cases furnish ample authority for holding the present grant to be a license: *Huff v. McCauley*, 53 Pa. 206; *Baldwin v. Taylor*, 166 Pa. 507; *Willis v. Railway Co.*, 188 Pa. 56; *Park Steel Co. v. Railway Co.*, 213 Pa. 322. While it is true licenses are usually given by parol, they may be conferred by instruments in writing. The nature and character of the grant do not depend upon the manner of making it, nor is the rule of revocability affected thereby: 1 Washburn on Real Property, 629; 25 Cyc. 645.

Decree affirmed at cost of appellant.

NOTE.—In *Wood v. Leadbitter*, *supra*, ALDERSON, B., said (p. 845): "It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol." See, *accord*,

*Doe v. Wood*, 2 B. & Ald. 724; *East Jersey Iron Co. v. Wright*, 32 N.J. Eq. 248, 253; *Funk v. Haldeman*, 53 Pa. 229.

A profit or easement cannot, at the common law, be created by an instrument not under seal. But it by no means follows that every right to use the land of another, given by an instrument under seal, creates a profit or easement.

The student should distinguish between (1) a lease of land which gives the lessee the exclusive right to the possession of the land; (2) a conveyance of part of the land as the unsevered timber or minerals, which gives the grantee title to such timber or minerals, with all rights of way necessary to make such title available (see Sheppard's Touchstone, 89); (3) a profit, which gives an interest in the land binding upon those who acquire the title to the land, and under which title may be acquired to things severed from the land, or caught thereon, but which gives no title to any part of the land (see cases cited in the note on p. 753, *supra*); (4) an easement, which gives an interest in the land binding upon those who acquire the title to the land, but which gives no title to any part of the land or any right to acquire title to things severed from the land or caught thereon; and (5) a license.

By an instrument under seal, A may give B a right to live in his house, or in a part thereof. Such instrument may create a lease, but if it was not the intention of the parties that B should have the exclusive possession, it will not be a lease, but a license. See *Smith v. St. Michael, Cambridge*, and the cases in the note on p. 69, *supra*; and *White v. Maynard*, 111 Mass. 250, 253.

Similarly, the court may be called upon to determine whether an instrument under seal amounts to a sale of minerals, or a profit to take minerals, or a license to take minerals. That it is under seal is not decisive of the nature of the right created by it. The nature of the right must be determined according to the intent of the parties.

Similarly, if by an instrument under seal A gives B a right to use his land (but not to take away anything from the land), it may well be that B has acquired no easement. Thus, the permitted use may not be connected with the enjoyment of any other land, and this would be fatal to the creation of an easement in those jurisdictions which do not permit easements in gross. See *Boatman v. Lasley, supra*. Or the permitted use may be such as will not be recognized as an interest in land. See *Hill v. Tupper, supra*, and the cases cited in the note on p. 768. Or, even if no considerations of public policy prevent the creation of an easement, the court may conclude that it was not the intention of the parties to create an easement.

A license is (laying aside the doctrine of licenses coupled with an interest) a revocable, non-assignable right. An instrument under seal may create only a license, if it was the intention of the parties to create that sort of right.

## RERICK v. KERN.

14 S. &amp; R. (Pa.) 267. 1826.

ON the return of a writ of error from the Common Pleas of Union County, it appeared from the record, that this was a special action on the case, brought by Henry Kern, the defendant in error, against Henry Rerick, the plaintiff in error, for diverting a water-course, in consequence of which he lost the use of his saw mill. The defendant pleaded, not guilty.

The material facts, proved on the trial, were, that some years before the institution of the suit, Henry Kern, the plaintiff below, being about to erect a saw mill on a stream which was designated by the witnesses as the right hand stream, a better seat for the mill was found by his millwright on what was termed the left hand stream. Kern thereupon applied to Rerick for permission to turn the water into the left land stream, which was granted. In consequence of this permission, he built the saw mill upon the left hand stream. Without the aid of the right hand stream, the water of the left hand stream would have been wholly insufficient, but the right hand stream alone would have served the purposes of the mill three or four months during the year. By a union of the two streams, the mill was rendered about a third more valuable than it would have been with the right hand stream alone. No deed was executed, nor was any consideration given, but Kern, in consequence of the permission given by Rerick, built a very good mill, which did a great deal of business, and which he would not have built on the left hand stream, if the permission had not been given. When the water was turned away by Rerick, the mill was in good order, and it was further proved, that, at the time the trial took place, there was as much or more water in the left hand stream than there had been before the erection of the saw mill.

The President of the Court of Common Pleas (CHAPMAN) charged the jury as follows:—

“Two questions arise in this cause. The first is, whether Henry Rerick, after permitting and agreeing that Henry Kern should turn the water from the right hand stream to the left hand stream, when, if he had not given that permission, he would have built his mill upon the right hand stream, can he, Henry Rerick, afterwards withdraw his permission, and thereby destroy the use of Kern’s saw mill. His withdrawing that permission after the mill was built, by removing the stones laid for the purpose of turning the water, if the jury believe these facts, would be a fraud and imposition upon Henry Kern, and he would have no right to remove them. But, if he had withdrawn his permission, and removed the dam before Henry Kern was at the expense of building a mill, he would have been justifiable

in so doing. Or if the permission was by parol to enjoy a right which could only pass by grant for a consideration, it would be within the statute of frauds and perjuries, and not good in law. But if the jury believe the act was fraudulent in Henry Rerick, he is liable to pay damages to Henry Kern for the injury done him. Of the amount of damages the jury are the judges. The second question, if the jury believe that no fraud has been committed by Henry Rerick, is, did Rerick, by removing the dam, divert the water from the left hand stream, so as to leave less water running in the left hand stream than there was formerly before the dam was erected? This is a fact for the jury, and if the jury believe that Rerick has diverted the water from the ancient channel, which he had no right to do to the injury of Kern, and that Kern has suffered damage thereby, the jury are to determine to what amount, if any damage the plaintiff has suffered."

The court was requested, by the counsel for the defendant, to instruct the jury in the following manner:—

"1. That if Rerick, about the year 1811, did allow the plaintiff, as proved by William Teats, to place an obstruction in the natural channel of one branch of the stream on Rerick's own land, yet that being without any consideration, and merely by parol, no legal right to the stream, or the use thereof, passed thereby to Kern, but Rerick had a right, at any time, to remove the said obstruction, so that the water could flow at any time in its natural channel.

*Answer.* "In answer to the first question,—he would have a right to remove the said obstruction, before Kern had incurred the expense of building a saw mill on the faith of Rerick's promise, or he would have had a right, if the permission or promise had been after the building of the mill, but not after he had induced Kern to be at the expense of building the mill.

"2. That an action for diverting an ancient water-course, does not lie for removing an artificial obstruction from the natural channel, whereby the water was made to flow as it used to do from time immemorial.

*Answer.* "That is the general principle of the law; but to this there are exceptions, where, by so doing, the party commits a fraud, and an action will lie.

"3. That if the jury believe the whole evidence exhibited by the plaintiff in this cause, Rerick could legally, in the fall of 1821, remove the dam placed in the forks of the stream, by Kern on Rerick's land, and for removing the same no action lies, whether Kern sustained thereby a loss or not.

*Answer.* "If the jury believe that there was no fraud in Rerick's removing the dam, in which case he would have a legal right to do it, no action would lie.

"4. That if the jury believe the water, ever since the removal of the obstruction at the forks, has run, and continues to run, in its

natural channel, as it used to do from time immemorial, their verdict should be for the defendant.

*Answer.* "If the jury so believe, and that no fraud was committed by removing this obstruction, or dam, then your verdict should be for the defendant."

The counsel for the defendant excepted to the opinion of the court, both in their charge to the jury, and in their answers to the several propositions submitted to them.

GIBSON, J. To the objection, that an action for diverting an ancient water-course is not supported by evidence of the removal of an artificial obstruction, it is sufficient to answer, that in the case before us, the right depends, not on the antiquity of the water-course, but on the agreement of the parties; and the question therefore is, would equity carry this agreement into effect?

That such an agreement may be proved by parol, was settled in *Le Fevre v. Le Fevre*, 4 Serg. & Rawle, 241, which, in this respect, goes as far as the case before us. The defence there was, that the right, being incorporeal, and therefore lying in grant, could pass only by deed. But, as the agreement was for a privilege to lay pipes, it is evident that the right acquired under it was no further incorporeal than that which passes by the grant of a mine, or of a right to build, which indisputably vests an interest in the soil. A right of way, which has been thought to approach it more nearly, in fact differs from it still further. But the defence in this case is put on other ground, it being contended that a mere license is revocable under all circumstances, and at any time.

But a license may become an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. Why should not such an agreement be decreed in specie? That a party should be let off from his contract, on payment of a compensation in damages, is consistent with no system of morals, but the common law, which was in this respect originally determined by political considerations, the policy of its military tenures requiring that the services to be rendered by the tenant to his feudal superior, should not be prevented by want of personal independence. Hence the judgment of a court of law operates on the right of a party, and the decree of a court of equity on the person. But the reason of this distinction has long ceased, and equity will execute every agreement for the breach of which damages may be recovered, where an action for damages would be an inadequate remedy. How very inadequate it would be in a case like this,

is perceived by considering that a license which has been followed by the expenditure of ten thousand dollars, as a necessary qualification to the enjoyment of it, may be revoked by an obstinate man who is not worth as many cents. But, besides this risk of insolvency, the law in barely compensating the want of performance, subjects the injured party to risk from the ignorance or dishonesty of those who are to estimate the *quantum* of the compensation. In the case under consideration, no objection to a specific performance can be founded on the intrinsic nature of the agreement, nor, having been partly executed, on the circumstance of its resting in parol; but it is to be considered as if there had been a formal conveyance of the right, and nothing remains but to determine its duration and extent.

A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by non-user, unless for a period sufficient to raise the presumption of a release. The right to rebuild, in case of destruction or dilapidation, and to continue the business on its original footing, may have been in view as necessary to his safety, and may have been an inducement to the particular investment in the first instance. The cost of rebuilding a furnace, for instance, would be trivial when weighed with the loss that would be caused by breaking up the business and turning the capital into other channels; and therefore a license to use water for a furnace would endure forever. But it is otherwise, where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right for the violation of which redress may be had by action. With this qualification it may safely be affirmed that expending money or labour, in consequence of a license to divert a water-course or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity. Here it was not pretended that the license had expired, and we are unable to discover an error in the opinion of the court on the points that were propounded.

*Judgment affirmed.*

NOTE. — See, *accord*, *Wynn v. Garland*, 19 Ark. 23 (*cf. Plunkett v. Meredith*, 72 Ark. 3); *Miller and Lux v. Kern*, 154 Cal. 785; *Hiers v.*



*Mill Haven Co.*, 113 Ga. 1002; *Joseph v. Wild*, 146 Ind. 249; *Patterson v. Burlington*, 141 Iowa 291; *Lee v. McLeod*, 12 Nev. 280; *Risien v. Brown*, 73 Tex. 135; *Barry v. Perry*, 82 Vt. 301.

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CROSDALE v. LANIGAN.

129 N.Y. 604. 1892.

ANDREWS, J. This case presents a question of importance from the principle involved, although the particular interest affected by the decision is not large.

The action was brought to obtain equitable relief by injunction to restrain the defendant from tearing down a stone wall erected on the defendant's land by the plaintiff, under an alleged parol license from the defendant, and in the erection of which the plaintiff expended in labor and materials a sum exceeding one hundred dollars. The parties are the owners of adjoining lots fronting upon a public street. The plaintiff's lot is west of the lot of the defendant. The land in its natural state descended toward the east. In 1886 the plaintiff graded his lot, and in so doing, raised an embankment several feet high along his eastern line, adjacent to the lot of the defendant, and erected a house on his lot. In 1887 the defendant graded his lot and excavated the earth up to his west line, adjacent to the embankment on the plaintiff's lot, to the depth of four or more feet, thereby removing the natural support to the lot of the plaintiff as it was in its original state. Before the defendant had completed his excavation, the parties had an interview and the question of the support of the plaintiff's embankment arose. The plaintiff claimed that the defendant was bound to build a wall where his excavation was. The defendant denied his obligation to do so and referred to the fact that the plaintiff had raised his land several feet higher than it was in its natural state. The plaintiff wanted the defendant to sell him two feet of his land to build a wall upon, which the defendant declined to do.

Both parties agree that the wall was spoken of. The plaintiff testified that nothing was said between them as to what kind of a wall the plaintiff would build, nor as to its height, dimensions or quality. The defendant on the other hand testified that the plaintiff stated he would build a wall laid up in mortar, pointed on the side facing the defendant's (proposed) house, and cement it on the top with Portland cement. Some days after the interview and on the 13th day of April, 1887, the defendant addressed a letter to the plaintiff, in which, after referring to their previous interview, he said: "While perfectly satisfied that I am justified in grading my lot as far as I have done, and that if at any time your embankment

should topple over on my land, that I could claim damages, yet, perhaps, I was a little hasty and somewhat unreasonable with you the other night, and although I came away fully determined to stand on my rights and keep every inch of ground that belonged to me, since then I have thought the matter over seriously, put myself in your place, so to speak, and decided to give you two feet asked for to build your wall on." The plaintiff on the same day replied in writing, saying: "I will be glad to accept your offer in the spirit in which it was given, and thus end a disagreement, etc. I expect to go to work immediately to build the wall, and will go as far into my bank as is consistent with its safety. I will also modify as much as I can the grade of the bank along the side and the front." The plaintiff thereupon proceeded to build a wall on the defendant's land, the building of which occupied four or five days. He first made a contract with a mason to build a mortared wall, and lime and sand were drawn upon the place to be used therefor. But for some reason he changed his mind, and he built the wall of "flat, ordinary building stone, not hewn into shape and not packed into regular courses, nor dressed at all," and without mortar or cement. The wall was ninety feet in length, two feet or less in width, and four to six feet high. It does not appear that the defendant saw the wall during the course of its construction, except that he was upon the lot on one occasion when the foundation was being laid, nor does it appear that he knew that the wall was to be laid up loose, or at any time consented to the erection of such a wall as was constructed. Within two weeks after the wall was completed he notified the attorney for the plaintiff, who, at the request of his client, had written him, demanding a deed of the two feet, that he had not agreed to give a deed, and that the wall was not built according to the understanding, and that he intended to tear it down.

This case was tried and decided upon the theory that the plaintiff had a license from the defendant to build the wall on his land, which, when executed, became in equity irrevocable. It was not claimed on the trial, nor is it now claimed, that there was any contract on the part of the defendant to sell the land occupied by the wall to the plaintiff, which, by reason of part performance, equity will enforce. The claim and the finding is that the license to enter upon the defendant's land, when acted upon by the plaintiff, conferred upon him a right in equity, in the nature of an easement, to maintain the wall on the defendant's lot. If this claim is well founded, there has been created, without deed and in violation of the Statute of Frauds, an interest in the plaintiff and his assigns in the land of the defendant, impairing the absolute title which he theretofore enjoyed, and subjecting his land to a servitude in favor of the adjacent property. It is quite immaterial in result that this interest claimed, if it exists, is equitable and not legal. An incumbrance has been created upon the

defendant's lot, and his ownership, to the extent of such interest, has been divested.

We are of opinion that this judgment is opposed to the rule of law established in this state. There has been much contrariety of decision in the courts of different states and jurisdictions. But the courts in this state have upheld with great steadiness the general rule that a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed, should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case. There are several circumstances in the present case which render the enforcement of such a jurisdiction a dangerous precedent. The only license claimed is contained in the letter of April thirteenth. The language is: "I have decided to give you the two feet you asked for to build your wall on." How far the wall was to extend, its character, or how it was to be built, is not stated. Referring to the previous interview to which the letter alludes, the evidence of the plaintiff of what was said at the interview leaves the whole matter indefinite and uncertain. He testifies that neither the description, dimensions nor character of the proposed wall were spoken of. The testimony of the defendant is to the contrary, but perhaps it is to be assumed that the trial judge adopted the testimony of the plaintiff.

Upon the case made by the plaintiff upon the letter and the prior conversations, if it was a case of contract, it is difficult to see how it could be enforced in equity. The cases are decisive that equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts. The extent of the injury which will be suffered unless equity intervenes is also an element to be considered when its extraordinary jurisdiction is invoked. Here the amount expended by the plaintiff in reliance upon the license was comparatively small. The most reasonable inference is that the plaintiff confided in the good faith of the defendant as his security

that the wall would be permitted to remain. It does not appear that anything was said as to the time it should be maintained. It is claimed that the wall was built for the benefit of both parties. This is founded on the assumption that the defendant's excavation removed the natural support of the plaintiff's land, and subjected him to liability. But this would not take the case out of the statute nor authorize the interference of equity to enforce the license as a grant in equity. The same element of common benefit is found in the case of *Cronkhite v. Cronkhite* (94 N.Y. 323).

The trial judge refused to find the facts as to the effect which would have followed from the defendant's excavation in case the plaintiff's land had continued in its natural state. He tried and decided the case on the theory that the license when executed became irrevocable. In this we think he erred. The cases of *Mumford v. Whitney* (15 Wend. 380); *Wiseman v. Lucksinger* (84 N.Y. 31) and *Cronkhite v. Cronkhite* (*supra*) are, we think, decisive of this action.

The judgment should be reversed. All concur.

*Judgment reversed.*

NOTE. — See, accord, *Hicks Bros. v. Swift Mill Co.*, 133 Ala. 411; *Foot v. New Haven R.R. Co.*, 23 Conn. 214; *Jackson & Sharp Co. v. Philadelphia R.R. Co.*, 4 Del. Ch. 180; *Howes v. Barmon*, 11 Idaho 64; *Entwhistle v. Henke*, 211 Ill. 273; *Stevens v. Stevens*, 11 Met. (Mass.) 251; *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406; *Minneapolis Mill Co. v. Minneapolis Ry. Co.*, 51 Minn. 304; *Belzoni Oil Co. v. Yazoo R.R. Co.*, 94 Miss. 58; *Pitzman v. Boyce*, 111 Mo. 387 (*cf.* *Cape Girardeau R.R. Co. v. St. Louis Ry. Co.*, 222 Mo. 461, 484); *Archer v. Chicago Ry. Co.*, 41 Mont. 56; *Houston v. Laffee*, 46 N.H. 505; *Lawrence v. Springer*, 49 N.J. Eq. 289; *Richmond R.R. Co. v. Durham R.R. Co.*, 104 N.C. 658; *Rodefer v. Pittsburg R.R. Co.*, 72 Ohio 272; *Foster v. Browning*, 4 R.I. 47; *Yeager v. Woodruff*, 17 Utah 361; *Hathaway v. Yakima Water Co.*, 14 Wash. 469; *Pifer v. Brown*, 43 W.Va. 412; *Thoemke v. Fiedler*, 91 Wis. 386.

CHAPTER IV.  
COVENANTS RUNNING WITH THE LAND.

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SECTION 1.  
WHERE THERE IS TENURE.

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STATUTE 32 HEN. VIII, c. 34.

1540.

WHERE before this time divers, as well temporal as ecclesiastical and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry manors, lordships, farms, meases, lands, tenements, meadows, pastures, or other hereditaments, for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants and agreements to be performed, as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on the behalf of the said lessors and grantors, their heirs and successors; (2) and forasmuch as by the common law of this realm, no stranger to any covenant, action or condition shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by the reason whereof, as well all grantees of reversions, as also all grantees and patentees of the King our sovereign lord, of sundry manors, lordships, granges, farms, meases, lands, tenements, meadows, pastures, or other hereditaments late belonging to monasteries, and other religious and ecclesiastical houses dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come to the hands and possession of the King's majesty since the fourth day of February the seven and twentieth year of his most noble reign, be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by the law have had against the same lessees for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants: (3) be it therefore enacted by the King our sovereign lord, the lords spiritual and temporal, and the commons, in this present parliament assembled, and by authority of the same, That as well all and every person and persons, and bodies politic, their heirs, successors and assigns,

which have or shall have any gift or grant of our said sovereign lord by his letters patents of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries, and other religious and ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the said fourth day of February the seven and twentieth year of his most noble reign, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, (4) as also all other persons being grantees or assignees to or by our said sovereign lord the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors and assigns of every of them, (5) shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for non-payment of the rent, or for doing of waste or other forfeiture; (6) and also shall and may have and enjoy all and every such like, and the same advantage, benefit and remedies by action only, for not performing of other conditions, covenants or agreements contained and expressed in the indentures of their said leases, demises or grants, against all and every the said lessees and farmers and grantees, their executors, administrators and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, (7) in like manner and form as if the reversion of such lands, tenements or hereditaments had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters patent had been made by his Highness.

II. Moreover be it enacted by authority aforesaid, that all farmers, lessees and grantees of lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments for term of years, life or lives, their executors, administrators and assigns, shall and may have like action, advantage and remedy against all and every person and persons and bodies politic, their heirs, successors and assigns, which have or shall have any gift or grant of the King our sovereign lord, or of any other person or persons, of the reversion of the same manors, lands, tenements, and other hereditaments so letten, or any parcel thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease and leases, as the same lessees, or any of them might and should have had against the said lessors and grantors, their heirs and successors; (2) all benefits and advantages of recoveries in value by reason of any warranty in deed or in law by voucher or otherwise only excepted.

III. Provided always, That this act, nor any thing or things therein contained, shall extend to hinder or charge any person or persons for the breach of any covenant or condition comprised in any such writing, as is aforesaid, but for such covenants and conditions as shall be broken or not performed, after the first day of September next coming, and not before; any thing before in this act contained to the contrary thereof notwithstanding.

NOTE. — In 1 Wms. Saund. 299, the learned editors said: "Perhaps the best way of reconciling the cases is, by considering that at common law covenants ran with the land, but not with the reversion. Therefore the assignee of the lessee was held to be liable in covenant, and to be entitled to bring covenant, but the assignee of the lessor was not." And see *Bally v. Wells*, 3 Wils. 25, 29.

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### SPENCER'S CASE.

5 Co. 16 a. 1583.

SPENCER and his wife brought an action of covenant against Clark, assignee to J. assignee to S. and the case was such: Spencer and his wife by deed indented demised a house and certain land (in the right of the wife) to S. for term of 21 years, by which indenture S. covenanted for him, his executors, and administrators, with the plaintiff, that he, his executors, administrators, or assigns, would build a brick wall upon part of the land demised, etc. S. assigned over his term to J. and J. to the defendant; *and for not making of the brick wall the plaintiff brought the action of covenant against the defendant as assignee*: and after many arguments at the bar, the case was excellently argued and debated by the justices at the bench: and in this case these points were unanimously resolved by Sir Christopher Wray, Chief Justice, Sir Thomas Gawdy, and the whole court. And many differences taken and agreed concerning express covenants, and covenants in law, and which of them run with the land, and which of them are collateral, and do not go with the land, and where the assignee shall be bound without naming him, and where not; and where he shall not be bound although he be expressly named, and where not.

1. When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee although he be not bound by express words: but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being: as if the lessee covenants

to repair the houses demised to him during the term, that is parcel of the contract, and extends to the support of the thing demised, and therefore is *quodam modo* annexed appurtenant to houses, and shall bind the assignee although he be not bound expressly by the covenant: but in the case at bar, the covenant concerns a thing which was not *in esse* at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors, or administrators, and not the assignee, for the law will not annex the covenant to a thing which hath no being.

2. It was resolved that in this case, if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. So on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a *Warrantia chartæ*, F. N. B. 135. & 9 E. 2. *Garr' de Charters* 30. 36 E. 3. *Garr.* 1. 4 H. 8. *Dyer* 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over; and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

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BLAKE v. SANDERSON.

1 Gray (Mass.) 332. 1854.

At the trial in the court of common pleas, before BISHOP, J., the plaintiffs gave in evidence a lease of the premises from themselves to Henry Hildreth for four years and six months from the first of March, 1848, at a yearly rent of three hundred and twenty-five dollars, payable in quarterly payments. By the terms of this lease, the lessee promised not to "lease nor underlet, nor permit any other person or persons to occupy or improve the premises, nor make, or suffer to be made, any alteration thereon, but with the approbation of the lessors thereto in writing having been first obtained." On the back of this lease was the following assignment:—



"Know all men by these presents, that I, the within named Henry Hildreth, for value received, do hereby assign, transfer and set over to Albert Sanderson the within lease, and all my right under the same, he to pay the rent and taxes from this date. Witness my hand and seal this first day of March A.D. 1849.

"In presence of Edward Blake,      HENRY HILDRETH, (Seal.)  
assenting to the assignment."

The plaintiffs also introduced evidence, tending to show that the lease and assignment were duly executed by the parties purporting to have executed them; that Hildreth occupied the premises under the lease, paying the rent until the 1st of March, 1849; and that from that date until the 30th of November, 1850, the defendant occupied, and paid the rent to the plaintiff Blake, who made out the bills to the defendant, and signed receipts for the rent, in this form: "Edward Blake, for self and Richard Robins, Executors, etc."

The defendant gave evidence tending to show that he vacated the premises before the 30th of November, 1850, and on that day gave the plaintiffs notice in writing, that he had vacated the premises, and that the same were at their disposal.

THOMAS, J. This action of contract is brought to recover of the defendant, as assignee of a lease, the rent of a shop on Cambridge Street from December 1st, 1850, to March 1st, 1851. The defendant says that there was no valid assignment of the lease, because by the terms of the lease no valid assignment could be made without the assent in writing of the lessors; and that assent was given only by Edward Blake, one of the lessors. The defendant entered under the assignment, and occupied the premises, and is clearly estopped to deny its validity. It was a condition for the benefit of the lessors, which they might waive, and did waive by recognizing the assignee as their tenant and receiving rent of him as such. By such assignment and acceptance of the lease, the defendant is bound to the performance of its conditions; and his liability for rent is to be governed by the terms of the lease, and not restricted to actual occupation.

NOTE. — A covenant that there shall be a lien, to secure the rent, on all improvements added to the premises, binds the assignee. *Webster v. Nichols*, 104 Ill. 160.

A covenant to pay taxes binds the assignee. *Salisbury v. Shirley*, 66 Cal. 223.

A covenant to pay "all assessments for which the premises shall be liable" binds the assignee, and he is bound to pay an assessment subsequently imposed for opening a street, although it was not authorized by any law existing at the time the lease was executed. *Post v. Kearney*, 2 N.Y. 394.

## COCKSON v. COCK.

Cro. Jac. 125. 1606.

COVENANT against the defendant as the assignee of Dalton; for that upon an indenture of demise Dalton covenanted for himself, his executors, and administrators, to leave fifteen acres every year for pasture *absque cultura*; and that he granted his estate to the defendant, and that the defendant *non reliquit quindecim acras ad pasturam*, but such a day and year ploughed up all. And upon this count it was demurred, Because the assignee not being named, it is not any covenant which shall bind the assignee, for it is collateral. But ALL THE COURT held, that this covenant is to be performed by the assignee, although he be not named; because it is for the benefit of the estate, according to the nature of the soil; but to perform a collateral covenant, as to build *de novo*, or such like, shall not bind him, unless named. Wherefore it was adjudged for the plaintiff.

NOTE. — A covenant to repair binds the assignee. *Demarest v. Willard*, 8 Cow. (N.Y.) 205.

A covenant to reside on the premises binds the assignee. *Tatem v. Chaplin*, 2 H. Bl. 133.

In *Wertheimer v. Hosmer*, 83 Mich. 56, the court said (p. 62): "The words contained in the lease, 'to be used for the sale of teas, coffees, spices, and similar goods,' amount to an express covenant not to be used for any other business. Covenants are not infrequently inserted in leases that the lessee shall not carry on particular trades upon the premises. This precaution often becomes necessary, not only for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good-will thereby diminished. Covenants of this kind, as they affect the mode of occupation and enjoyment, run with the land, and the assignee, though not named, will be liable to an action for damages, and may be restrained by injunction."

## WILLIAMS v. EARLE.

L. R. 3 Q.B. 739. 1868.

BLACKBURN, J. This is an action by the lessor against the assignee of a lease for breach of covenants in the lease, and the rule has been well established ever since *Spencer's Case*, 5 Rep. 16 a; 1 Sm. L. C. 6th ed. 45, that, when covenants are contained in a lease (at all events if, as in the present case, the covenants are on behalf of the lessee and his assigns), and the covenants touch or concern the land, although the original covenants are made by the original lessee with

the lessor, yet they run with the land, and there being privity of estate between the assignee and the lessor, the lessor may sue the assignee for breach of any of them. But this is only in the case of a covenant which "touches or concerns" the land.

Now the first and chief point to be determined here is, there being a covenant in the original lease by which the lessees, on behalf of themselves and their assigns, covenant with the lessor that neither they nor their assigns will assign the lease without the licence of the mortgagor and mortgagee, and the defendant the assignee having assigned without their licence, whether that is a covenant which touches or concerns the land, and therefore runs with it and binds defendant.

I have been unable to perceive, after listening attentively to the argument of the counsel for the defendant, any reason why this covenant should not be considered a covenant touching and concerning the land. It is an express covenant as to who shall have and occupy the land, and it is inserted with a view that the landlord shall not be deprived of a voice as to who shall be substituted for the original lessee in the possession of the landlord's premises. It is certainly very material as touching the interest of the landlord and tenant, and touches and concerns the thing demised quite as directly as the many covenants that have been held to do so. Such as a covenant to renew a lease, which has been held to run with the land in more than one case cited in the judgment of the court in *Roe v. Hayley*, 12 East, at p. 469; or a covenant to reside in the demised premises, which was held in *Tatem v. Chaplin*, 2 H. Bl. 133, to bind the assignee though not named. Again, in *Bally v. Wells*, 3 Wils. 25, 33, a covenant not to let any of the farmers take the tithes demised without the consent of the lessor was held to run with the tithes and bind the assignee, assigns being mentioned in the covenant. And the expression made use of by the court at the end of the judgment, which Mr. Jones relied upon as shewing that a covenant to assign without a licence could not run with the land, seems to have no such meaning, but the contrary. The expression is, "a covenant not to assign generally must be personal and collateral, and can only bind the lessor himself, there never can be an assignee;" but the court adds, "whereas the present lease grants to executors, administrators, and assigns;" and what they seem to have meant is, that when the lessee covenants, not that he will not assign without licence, but that he will not assign at all, then the covenant of course does not run with the land, because the covenant is gone whether the assignment be with a licence or without. But when there is a covenant that the lessee and his assigns will not assign without licence, it is different, and the covenant may run with the land toties quoties. It seems to me, therefore, both upon principle and authority, that the present covenant not to assign without licence from the landlord from time to time, does run with the land, and consequently the defendant, the assignee, is liable for the breach.

But though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative, and the estate passed from the defendant to Banks, and the breaches of covenant which have occurred since are not breaches for which the defendant can be liable in the present form of action; anything done by the defendant on the premises since then he may be liable for in an action on the case: but the remedy on the covenants must be against the new tenant Banks. But the plaintiff is entitled to recover indirectly in the present action by way of damages for the breach of the covenant not to assign. For inasmuch as, if the covenant not to assign had not been broken, the assignee would have remained liable to the plaintiff to fulfil all these covenants, the breaches of which are mentioned in the first count, and there would have been, if he remained solvent, a complete and sufficient remedy in his liability, the defendant having assigned over to a person, who no doubt is selected because he has nothing to lose and so loses nothing by incurring the liability under the covenants, there has been damage sustained by the plaintiff by the defendant's breach of covenant not to assign, by reason of the plaintiff only having the liability of this inferior person, instead of the liability of the defendant, for the breaches of the other covenants; and the arbitrator, in assessing the damages on the second count, must put the plaintiff, as far as possible, in the same position, so far as money will do it, as if the covenant had not been broken. The arbitrator will take into consideration how much the worse the plaintiff will be both in respect of breaches of covenant already incurred, as well as in respect of breaches which may in future be incurred. The arbitrator must see what sum of money will put the plaintiff in the same position as he would have been in if the covenant not to assign the lease had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. I agree with Mr. Jones that this will be a matter of some difficulty, and the parties would do well to agree that the lease shall be surrendered to the plaintiff, and then the measure of damages will be by how much worse off the plaintiff is than he would have been had the defendant continued bound as lessee all the time, as he would have been had he not broken his covenant not to assign.

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VERNON v. SMITH.

5 B. & Ald. 1. 1821.

COVENANT by the assignee of the lessor against the lessee. The declaration stated, that one J. Hance, the lessor, before the time of making the lease, was lawfully possessed of the tenements and premises for the residue and remainder of a certain term of years, whereof

seven years were then unexpired; which tenements and premises, with the appurtenances, then were and thence hitherto have been and still are situate within the weekly bills of mortality, mentioned in the 14 G. 3, c. 78; and being so possessed thereof, he, the said J. Hance, by indenture, demised and leased to the defendant the tenements and premises, with the appurtenances, *habendum*, for seven years, at a certain rent therein mentioned; covenant by the defendant that he should and would forthwith, at his own expense, and from time to time during the term, insure in some of the public offices in London or Westminster, for the purpose of insuring houses from casualties by fire, the messuage, dwelling-house, coach-house, stable, and premises thereby demised or thereafter to be erected and built thereon, to the amount of 800*l.*, in the joint names of the defendant, his executors, administrators, or assigns, and of Robert Stone, the ground landlord of the premises, his heirs or assigns; and should and would, at the request of Hance, or of the ground landlord, their heirs or assigns, produce the policy and receipts for such insurance. The declaration set out the proviso in the lease for re-entry, on breach of any of the covenants. It then stated the defendant's entry into the premises, and that, after the making of the indenture, the term was assigned by Hance to the plaintiff. The breach assigned was, that the defendant did not insure. The second count stated, that, before the making of the demise to the defendant, in the first count mentioned, and also before and at the time of the making of the demise thereafter mentioned, Robert Stone was seised in fee of and in the said demised tenements, and by a certain indenture, demised the same to J. Hance, *habendum*, for eighty-five years and six months. And that J. Hance, by that indenture, covenanted to insure the premises from fire, to the amount of three fourths of the value thereof, in the joint names of himself and Stone, with a proviso for re-entry, in case of non-performance of the covenants. It then stated, that three fourths of the value of the premises amounted to 800*l.*, and that, by reason of the said demised premises remaining uninsured, Stone brought an action of ejectment for the forfeiture, and the plaintiff was forced to pay the costs to him, amounting to 500*l.*, and also to sustain his own costs, amounting to 1000*l.* Breach, that the defendant had not kept the covenant made by him, as stated in the first count. To this declaration, there was a general demurrer and joinder.

ABBOTT, C.J. It is not necessary, on the present occasion, to give any opinion on the effect of a covenant to insure premises situate without the limits mentioned in the 14 Geo. 3, c. 78. These premises lying within those limits, the effect of that statute is, to enable the landlord, by application to the governors or directors of the insurance office, to have the sum insured laid out in rebuilding the premises. Now a covenant to lay out a given sum of money in rebuilding or

repairing the premises, in case of damage by fire, would clearly be a covenant running with the land, that is, such a covenant as would be binding on the assignee of the lessee, and which the assignee of the lessor might enforce. Here the defendant does not covenant expressly in those words, but only that he will provide the means of having 800*l.* ready to be laid out in rebuilding the premises in case of fire. But, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord as if the tenant had expressly covenanted that he would lay out the money he received in respect of the policy upon the premises. For these reasons, I think that this is a covenant running with the land, for the breach of which the assignee of the lessor may sue; and, consequently, there must be judgment for the plaintiff.

HOLROYD, J. I am of the same opinion. If the covenant to insure to the amount of 800*l.*, in case of fire, could be considered as a covenant to pay a collateral sum to the lessor, the present action could not be supported; but, taking that covenant, together with the Stat. 14 G. 3, c. 78, s. 83, I think that the sum insured is not to be considered as a collateral sum, but as a sum which, by operation of law, must be laid out upon the premises. It is, therefore, a covenant to do a matter which concerns the land, and falls within the rule laid down in *Spencer's Case*, and by Lord Chief Justice WILMOT in *Bally v. Wells*. He there lays it down thus: "Covenants in leases, extending to a thing 'in esse,' parcel of the demise, run with the land, and bind the assignee, though he be not named, as to repair, etc. And if they relate to a thing not 'in esse,' but yet the thing to be done is upon the land demised, as to build a new house or wall, the assignees, if named, are bound by the covenants; but if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor, the assignee, though named, is not bound by such covenants; or if the lease is of sheep or other personal goods, the assignee, though named, is not bound by any covenant concerning them. The reasons why the assignees, though named, are not bound in the two last cases, are not the same. In the first case, it is because the thing covenanted to be done has not the least reference to the thing demised; it is a substantive, independent agreement, not 'quodam modo,' but 'nullo modo,' annexed or appurtenant to the thing leased. In the case of the mere personalty, the covenant doth concern and touch the thing demised; for it is to restore it or the value at the end of the term; but it doth not bind the assignee, because there is no privity, as there is in the case of a realty between the lessor and lessee and his assigns, in respect of the reversion; it is merely collateral in one case; in the other it is not collateral, but they are total strangers to one another, without any line or thread to

unite and tie them together; and to constitute that privity which must subsist between debtor and creditor to support an action." And in page 346, after citing several cases, from which he deduces the principle laid down, he says, "All these cases clearly prove, that 'inherent' covenants, and such as tend to the support and maintenance of the thing demised, where assigns are expressly mentioned, follow the reversion and the lease, let them go where they will." In the present covenant, assigns are expressly included; and, inasmuch as the performance of the covenant would, in the event of the premises being destroyed or injured by fire, tend to the support and maintenance of the thing demised, I am of opinion, that it falls within the rule laid down by Lord C.J. WILMOT, and, consequently, that there must be judgment for the plaintiff.

NOTE. — See, *accord*, *Thomas' Admrs. v. Vonkapff's Heirs*, 6 Gill. & J. (Md.) 372, 381; *Masury v. Southworth*, 9 Ohio St. 340.

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### CONGLETON v. PATTISON.

10 East 129. 1808.

THE plaintiffs declared in covenant upon an indenture, made the 23d November, 1752, whereby they demised to John Clayton a piece of ground in Congleton, called the Byflatt, and a certain slip of land, through which a water-course was intended to be made, with liberty for making and repairing the same, and with liberty for Clayton, his executors, administrators, or assigns, to erect in the Byflatt a silk mill, etc., *habendum* the said piece of ground and premises, etc., to Clayton, his executors, administrators, and assigns, for 300 years from the date of the indenture; yielding and paying as therein mentioned. And Clayton covenanted for himself, his executors, administrators, and assigns, with the corporation, that he, his executors, etc., would at all times during the term, before any persons should be received as servants, workmen, or apprentices in such silk mill, give notice of their names to the town-clerk of the borough for the time being; and if he should immediately give satisfactory information to Clayton, his executors, etc., or to the then owner or occupier of the silk mill, that any of the persons in such notice were legally settled in any other parish or township, and not in Congleton, then they should not be received to work in the business of such silk mill, before a certificate of the settlement of such person under the Stat. 8 & 9 W. 3, c. 30, should be given to Congleton. The declaration then stated the entry of J. Clayton, and the building of the silk mill; and that on the 1st of January, 1790, all the estate and interest, etc., of J. Clayton in the premises duly came to and vested in the defend-

ants by assignment, by virtue of which they entered and were possessed, etc.: and then assigned as a breach, that after the defendants became so possessed, and while they were working the silk mill, and during the continuance of the term, they received divers persons as servants, workmen, and apprentices to work in the said mill, without giving the previous notice before mentioned to the town-clerk of Congleton, and that the persons so received worked in the said mill without any such notice, and that they had not previously gained any settlement in Congleton; by reason of which the township of Congleton had become liable to relieve them and their families, and had expended a large sum in the same, and continued liable to the burden, etc.; and that the plaintiffs had also incurred great expense in the premises, and their estates and property in the township had been lessened in value.

The defendants, after craving oyer of the indenture, by which it appeared further, that the term was granted by the corporation in consideration of 80*l.* paid and of a nominal yearly rent; demurred generally to the declaration.

LORD ELLENBOROUGH, C.J. This is a covenant in which the assignee is specifically named; and though it were for a thing not in esse at the time, yet being specifically named, it would bind him, if it affected the nature, quality, or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it. But this covenant does not affect the thing demised, in the one way or the other. It may indeed collaterally affect the lessors as to other lands they may have in possession in the same parish, by increasing the poor's rate upon them; but it cannot affect them even collaterally in respect of the demised premises during the term. How then can it affect the nature, quality, or value of the thing demised? Can it make any difference to the mills, whether they are worked by persons of one parish or another: or can it affect the value of the thing at the end of the term, independently of collateral circumstances? The settling an additional number of persons in this place may indeed, by means of the increased population, bring an increased burden at the end of the term on those who are to pay the rates: but that increase of population may also be an increased benefit of the land-owners, as it has happened within our own experience in many parts of this kingdom, the seats of manufactures, where the value of land has, in consequence, risen in a great proportion. But the covenant in question does not affect the thing demised immediately, but only, if at all, in respect of collateral circumstances; that is through the medium of an increased population, and the increased expense of providing for them on the one hand, with the increased value of the lands to be set against it on the other hand. How then does it affect the mode of occupation? The carrying on of a particular trade on the premises may be said to do that; but where the work to



be done is at all events the same, whether it be done by workmen from one parish or another cannot affect the mode of occupation. The covenant, therefore, not directly affecting the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named; and this is a question with the assignee, and not with the original lessee who entered into the covenant. In the case of *Bally v. Wells* the covenant might affect the thing demised; for if the lessee of the tithe suffered any of the farmers of the parish to take their own tithes, such union of the land with the tithe might lay a foundation for claiming a modus, which might affect the future value of the tithes, and would immediately affect the occupation. But we cannot say that this covenant does either; and therefore it does not run with the land so as to bind the assignees.

LE BLANC, J. This covenant does not appear to me to run with the land, or bind the assignee. The question does not depend upon the length of the lease, or whether the injury to the lessor is to take effect in more or less time, but whether the thing covenanted to be done or not to be done immediately affects the land itself or the mode of occupying it. But here it is only by collateral circumstances that this can make the land more or less valuable. It can no otherwise affect the land than as by introducing a greater number of persons into the parish who were not before settled there, and by enabling them to gain settlements, it may by possibility hereafter create a greater number of poor, who must be maintained by the occupiers, and so affect them: but this cannot be said to affect the land itself, or the mode of cultivating or occupying it. It is no more than if the lessee had covenanted that he would not employ such persons in any other house within the parish during his occupation of the premises in question. The work done is the same, whether by one set of servants or another; the nature of the property is not varied by it: but to employ persons in the mill who were not before settled inhabitants of Congleton may create a speculation whether it will affect the interests of the occupiers there. The ground, however, on which I distinguish this case from others is that this is not a covenant which affects the land itself or the mode of its occupation.

BAYLEY, J. I agree that it is not material to consider how soon the act done, which was covenanted not to be done, may affect the land; but in order to bind the assignee the covenant must either affect the land itself during the term, such as those which regard the mode of occupation; or it must be such as per se, and not merely from collateral circumstances, affect the value of the land at the end of the term. Covenants to restrain the exercise of particular trades in houses fall within the first class: they affect the mode in which the property is to be enjoyed during the term. The case in *Wilson* may rank under the second class: for if the lessee or a stranger were in the

actual occupation of the tithes during the term, the evidence of the lessor's right to them would be continued, and therefore the estate of the reversioner would be better at the end of the term. But here the state of the premises will be the same at the end of the term, whether the parish be more or less burdened with poor. I agree that the value of the reversion will not be so much if the poor's rate on the land be increased; but that burden would be increased by a collateral circumstance; and where the value of the reversion is only altered by collateral circumstances, the covenant will not bind the assignee of the land. As in the instance put of a covenant not to employ foreigners in any other mill in the parish: and yet the value of the reversion would be affected in the same manner in the one instance as in the other. Suppose a covenant by the lessee to make a communication by water from the demised premises through other persons' lands to another place, to facilitate the access to a market, the value of the reversion would be materially affected by the performance or non-performance of such a covenant; but it could not bind the assignee, because all the cases shew that the assignee is not bound unless the thing to be done is upon the land demised. Therefore, as this covenant does not affect the occupation of the land, nor alter the actual state of the property from what it would otherwise be at the end of the term, it does not bind the assignee.

*Judgment for the defendant.*

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LEPPLA v. MACKEY.

81 Minn. 75. 1883.

THE plaintiff brought this action in the district court for Hennepin County, to compel the execution by defendants of a lease of certain land, in accordance with the terms of a prior lease mentioned in the opinion. The action was tried by SHAW, J., without a jury, and judgment ordered and entered for defendants, from which the plaintiff appeals.

DICKINSON, J. Harmon leased land, of which he was the owner, to Slosson, for the term of three years, "with the right," as expressed in the lease, "to the said second party to a renewal of this lease at the same yearly rental, and subject to the same conditions as herein, for the further term of two years, unless the party of the first part wishes the piece of land for building purposes." During the term of the lease, the lessee assigned his interest to the plaintiff. The lessor conveyed the land to the defendant Mackey, who, desiring to use the land for building purposes, declined to renew the lease. The case only calls for a determination of the legal rights and obligations of the parties respecting a renewal of the lease.

Although the covenant for a renewal of the lease was made in terms merely in favor of the lessee, it is well settled that such a covenant runs with the land to one who, by assignment, comes to stand in the place of the covenantee. And, since the covenant runs with the land, it is obligatory, not only upon the covenantor, but upon his grantee. The legal effect of the covenant is hence clearly the same as if it read, "with the right to the said second party or his assigns to a renewal of this lease from the party of the first part or his assigns, . . . unless the party of the first part wishes the piece of land for building purposes." Neither by the assignment to the plaintiff, nor by the grant to the defendant Mackey, was the covenant for renewal discharged of the condition which was a part of it.

The only question in the case is as to the construction to be placed upon the terms of the condition. We seek to arrive at the intention of the contracting parties from a consideration of the terms in which their agreement is expressed. They are to be deemed to have understood that this covenant would be binding upon, and its performance might be enforced against, not only the then owner of the land, the lessor, but as well his heirs or grantees. In the light of this fact, we cannot reasonably construe the contract either as expressing the intention that the right to a renewal of the lease, in the event of a sale of the property by the lessor, or in the event of his death, should be still dependent upon his election to use the land, nor that, by such death or alienation, the substantial terms of the covenant should be so changed as to be no longer subject to any condition, and that the succeeding owner of the property should have no option, but must grant a renewal of the lease, although he might wish to build upon the land. We construe the clause as a condition inseparable from the covenant of which it is an integral part, and that it has the effect to reserve to the grantee of the reversion the same right of election that his grantor, the plaintiff's lessor, had.

*Judgment affirmed.*

NOTE. — The assignee of the reversion is bound by a covenant to renew the lease. *Leiter v. Pike*, 127 Ill. 287, 326; *Richardson v. Sydenham*, 2 Vern. 447; *Roe v. Hayley*, 12 East 463, 468.

And an assignee of the lessee may enforce such a covenant. *Robinson v. Perry*, 21 Ga. 183; *Blackmore v. Boardman*, 28 Mo. 420. *Piggot v. Mason*, 1 Paige (N.Y.) 411.

In *Postal Tel. Co. v. Western Union Tel. Co.*, 155 Ill. 335, the landlord leased offices in a building to a telegraph company, and covenanted not to lease any other offices in the building for the same purpose. The court held that the assignee of the reversioner could itself use other portions of the building for a telegraph office.

## MINSHULL v. OAKES.

2 H. &amp; N. 793. 1858.

POLLOCK, C.B. Two entirely distinct questions arose in this case. The declaration was on a demise to the lessee, his executors, administrators and assigns, in consideration of the rents and covenants on the part and behalf of the lessee and his assigns to be paid, done, and performed, of a messuage and lands, with liberty to the lessee, his executors, administrators and assigns, to make any erections or buildings. The lessee covenanted for himself, his heirs, executors and administrators (not saying assigns), that he, his heirs, executors, administrators or assigns, would pay rent; and that he, his executors or administrators, would repair the messuage and farm, outhouses, barns, stable, and all other erections and buildings which should or might be thereafter erected, and all the gates, etc., and the same being so repaired, he, the lessee, his executors, administrators, and assigns, at the end of the term would yield up. There was a breach alleged, in non-repair and not yielding up in repair. The third plea was pleaded to a part of this, viz., to so much as complained in respect of a water corn mill, cottages, and other buildings erected and built during the term, and shewed that they were buildings erected during the term, and not erected in place of others previously existing. It was contended that this plea was good on the authority of the first resolution in *Spencer's Case*, 5 Rep. 16 a, the lessee not having covenanted for his assigns.

The state of the authorities in question seems as follows: The proposition, that a covenant which would run with the land if the assignee were named, does not where he is not named and the thing was not in esse at the time of the making of the covenant, is laid down in *Spencer's Case*. The same is to be found in Comyns' Digest, Covt. (C.) 3, citing *Spencer's Case* and Jones, 223, which, however, does not support the doctrine. It is not found in Rolle. It is in Viner's Abridgement, "Covenant" (L.), where, however, Moor, 159, is cited as establishing the same, when in truth it established the contrary. It is negatively sanctioned by the silence of the author and editors of Smith's Leading Cases, and it is cited in *Doughty v. Bowman*, 11 Q. B. 444, where, however, with submission, it was inapplicable. There the question was if an assignee of the reversion was bound, which depends on different considerations: 1 Wms. Saunders, 241 d. In Sheppard's Touchstone, 180, it is thus put, "If the lessee covenant for himself, or for himself, his executors or administrators only, to build a new house upon the land, the assignee is not bound;" the editor adds, because he is not named. In page 179, *Spencer's Case* is cited, but the case put is of a new house. A similar remark applies to *Cockson v. Cock*, Cro. Jac. 125, where a covenant to build de novo is

called collateral. But it may be not unreasonably said that to build a new house does not "extend to the support of the thing demised." Indeed Lord Coke thought it waste: Co. Litt. 53 a. On the other hand, Moor, p. 159, pl. 300 (which is evidently *Spencer's Case*, though the date is later), gives the decision the other way. The explanation may be, that Lord Coke is reporting a variety of arguments and opinions expressed, while Moor gives the ultimate decision. *Smith v. Arnold*, 3 Salk. 4, is directly contrary: and in *Bally v. Wells*, 3 Wils. 25, the contrary is stated. No reason is given for the alleged difference between where the assignee is and is not named; on the contrary, the reason given for binding in any case an assignee not named, viz., that he takes the benefit and burthen, seems equally to apply to every such case.

No doubt, as Mr. Atherton said, if the law were clearly laid down without contradiction (as he contends it is), it ought to be abided by, though no reason could be given for it. It would not be enough, to justify a departure from it, that it was without a known reason; it ought to be followed, at least, unless contrary and repugnant to other rules and principles. But in deciding which of two conflicting sets of authorities is correct, it is not irrelevant to look at the reason of the thing. No doubt the resolution in *Spencer's Case* has been repeatedly cited, or the same thing said as is said there; but that resolution is the foundation of the opinion; it never appears to have been acted on; on the contrary, Moor, 159, and *Smith v. Arnold* are decisions the other way. In the present case we think it sufficient to say, that as the covenant is not a covenant absolutely to do a new thing, but to do something conditionally, viz., if there are new buildings, to repair them; as when built they will be part of *the thing demised*, and consequently the covenant extends to its support, and as the covenant clearly binds the assignee to repair things in esse at the time of the lease, so does it also those in posse, and consequently the assignee is bound. There is only one covenant to repair; if the assignee is included as to part, why not as to all? On these grounds we think the third plea bad.

NOTE. — There have been some decisions in this country in support of the first resolution in *Spencer's Case*, in cases arising between landlord and tenant. See *Hansen v. Meyer*, 81 Ill. 321; *Thompson v. Rose*, 8 Cowen (N.Y.) 266; *Bream v. Dickerson*, 2 Humph. (Tenn.) 126.

And there have been numerous dicta in its support. See *Emerson v. Simpson*, 43 N.H. 475, 477; *Brewer v. Marshall*, 18 N.J. Eq. 337, 341; *Hartung v. Witte*, 59 Wis. 285, 295. See also *Bailey v. Richardson*, 66 Cal. 416, 420; *Kellogg v. Robinson*, 6 Vt. 276, 280.

As will be seen from the cases in Section 2, *infra*, the courts are cautious about allowing a covenant to run with the land, in cases

where there is no tenure. The fact that assigns were not named may lead the court to conclude that it was the intention of the parties that the covenant should be personal to the covenantor. See *Dawson v. Western Maryland R.R. Co.*, 107 Md. 70; *Maryland R.R. Co. v. Silver*, 110 Md. 510; *Newburg Petroleum Co. v. Weare*, 44 Ohio St. 604, 613; *Brown v. Southern Pacific Co.*, 36 Or. 128; *Gulf Ry. Co. v. Smith*, 72 Tex. 122.

On the other hand, it was held in *Harris v. Coulbourn's Assignee*, 3 Harr. (Del.) 338, that a covenant to pull down an old chimney and erect a new one bound the assignee of the lessee, though not named; similarly, in *Bradford Oil Co. v. Blair*, 113 Pa. 83, of a covenant to explore for oil, which involved boring new wells; and in *Frederick v. Callahan*, 40 Iowa 311, of a covenant by the reversioner to pay for improvements made during the term.

In *Dorsey v. St. Louis R.R. Co.*, 58 Ill. 65, the railroad had, when the covenant was made, no authority to assign its property, and the court held that in such case the omission of the word "assigns" from its covenant did not relieve its assignee from liability.

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### HOLFORD v. HATCH.

1 Doug. 183. 1779.

THIS was an action of covenant, for rent in arrear, brought against the defendant as assignee of one Saunders. The declaration stated (in the common form), that the plaintiff demised to Saunders for seven years, by virtue whereof he entered and was possessed, and that afterwards, *all the estate, right, title, and interest*, of Saunders, in the premises, came to the defendant, *by assignment* thereof, by virtue whereof he entered and was possessed, and that, after the assignment, rent had become due, which the defendant had not paid. The defendant *pleaded*, that *all the estate, right, title, and interest*, of Saunders in the premises, did not come to him by assignment thereof in manner and form as the plaintiff had alleged.

On the trial, it appeared, that the defendant was in possession of the premises during the time when the rent in arrear became due, but that, by the deed under which he held, they were conveyed to him, by Saunders, for a day, or some days less than the original term, and that he had actually surrendered them before the action was brought. Some receipts also were produced for rent which had been paid by the defendant to the plaintiff, and which run thus: "Received of Saunders by the hands of Hatch."

Upon this evidence, it was contended, at the trial, which came on before Lord MANSFIELD, at the Sittings for Middlesex, in last Hilary Term: 1. That, in point of law, a person holding of the first

lessee, by an under-lease, like the present, is not liable to be sued by the original lessor, on the covenant for rent contained in the original lease; 2. That the fact put in issue on the record, viz., that *all* the estate, etc., of Saunders came to the defendant, was not proved.

A verdict was found for the plaintiff, but Lord MANSFIELD saved the points made by the defendant's counsel, for the opinion of the court.

Lord MANSFIELD. This is an action of covenant by a lessor against an under-lessee, and the single question is, whether the action can be maintained against him, as being, substantially, an assignee. For some time, we had great doubts; we have bestowed a great deal of consideration on the subject, and looked fully into the books, and it is clearly settled (and is agreeable to the text of Littleton), that the action cannot be maintained, unless against an assignee of the whole term.

*The rule made absolute.*

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### CONGHAM v. KING.

Cro. Car. 221. 1631.

COVENANT against the defendant, as assignee of an assignee, for not repairing of an house let *inter alia*.

[It was argued] that the defendant is but assignee of parcel of the things demised. *Sed non allocatur*; for this covenant is dividable, and follows the land, with which the defendant, as assignee, is chargeable by the common law, or by the statute of 32 Hen. 8, c. 37. Whereupon it was adjudged for the plaintiff.

NOTE. — The assignee of the reversion in part of the leased premises is bound, as to that part, by a covenant to renew the lease. *Leiter v. Pike*, 127 Ill. 287.

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### WALL v. HINDS.

4 Gray (Mass.) 256. 1855.

THE plaintiff leased premises to the defendant, and the defendant covenanted to pay the rent reserved. The defendant assigned the term, and the plaintiff accepted rent from the assignee. Thereafter rent fell in arrear, and the plaintiff brought this action of covenant against the defendant.

BIGELOW, J. The assignment by the lessee of his entire interest in the estate under the lease, and the acceptance of rent by the

plaintiffs from the assignees, do not constitute a valid defence to the present suit. It is the well-settled rule of law that in such case the lessor cannot maintain an action of debt for rent against the lessee; but that an action will lie against him on the covenant for the payment of rent. The reason of the rule is, that, although by the assignment the privity of estate between lessor and lessee is terminated, there still remains the privity of contract between them, created by the lease, which is not affected by the assignment. The lessee still continues liable on his covenant, by virtue of the privity of contract. *Bachelour v. Gage*, Cro. Car. 188; *Barnard v. Godscall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Saund. 240; *Auriol v. Mills*, 4 T. R. 94.

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NEAL v. JEFFERSON.

212 Mass. 517. 1912.

CONTRACT for the alleged breach of a covenant of renewal in a lease. Writ dated October 31, 1910.

In the Superior Court the case was tried before DUBUQUE, J. The defendant was the executrix of the will of Joseph Jefferson, late of Bourne. The lease was dated May 22, 1909, and was for the term of one year from November 1, 1909, at the annual rent of \$1000. The lessor was described as "the estate of Joseph Jefferson." The covenant sued upon was as follows: "And the said lessor further covenants that it will, on or before the first day of June, A.D. 1910, at the request of the said lessee, execute to and with him a new lease of the premises herein leased, for the further term of two years, to commence from the expiration of the term hereby granted, at the same yearly rent, payable in like manner and with and subject to the like covenants, agreements and provisos, except the covenant for further renewal, as are herein contained."

The leased premises consisted of the Hotel Jefferson in West Palm Beach in Florida and an adjoining cottage with the furnishings.

On March 10, 1910, the defendant, as executrix, sold the leased premises to two brothers named Anthony and delivered to them the duplicate original of the lease to the plaintiff. The Anthonys refused to renew the lease, except at an increased rental.

The defendant requested the judge to give the following instruction: "6. After the transfer of the Hotel Jefferson and Huffstetter Cottage to the Anthonys, with notice of the lease to the plaintiff and the covenant for renewal contained therein, Sarah A. Jefferson was not liable for any failure of the Anthonys to respect the plaintiff's right to a renewal lease." The judge refused to give this instruction.

SHELDON, J. It is not material to determine whether the plaintiff could have enforced specifically against the defendant's grantees her



agreement to give him a new lease. However this might be, the defendant was personally liable upon her covenant, and her conveyance of the leased premises did not relieve her from that liability. *Riley v. Hale*, 158 Mass. 240; *Jones v. Parker*, 163 Mass. 564, 568; *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130, 133. See *Manning v. Fitch*, 138 Mass. 273; *Tufts v. Atlantic Telegraph Co.*, 151 Mass. 269. The cases of *Hickey v. Railway Co.*, 51 Ohio St. 40, and *Sexauer v. Wilson*, 136 Iowa, 357, relied on by the defendant, turned on what was regarded in those cases as the intention of the parties. We need not consider whether, upon similar facts, we should follow those decisions.

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MASON v. SMITH.

131 Mass. 510. 1881.

CONTRACT for money paid. Trial in the Superior Court, without a jury, before DEWEY, J., who allowed a bill of exceptions, in substance as follows:—

On December 20, 1869, Nancy J. Fuller leased to the plaintiff a parcel of land in Boston, for the term of fifteen years from January 1, 1870, by an instrument under seal and duly recorded, the lessee covenanting to pay rent and taxes. On April 8, 1870, the plaintiff assigned the lease to the defendant by an instrument under seal, written on the back of the lease, and signed by him, as follows: "Boston, April 8, 1870. In consideration of one dollar and other good and valuable considerations paid to me by T. H. Smith, the receipt whereof is hereby acknowledged, I do hereby assign to said Smith all my right, title and interest to the within written instrument." This assignment was recorded on the same day. On March 12, 1873, the defendant, by a similar indorsement on the lease, assigned the lease to John Carney. The plaintiff had no knowledge of this assignment, and it was not recorded until June 14, 1877.

On April 10, 1876, the heir at law of Nancy J. Fuller brought an action against the plaintiff, upon the covenant in the lease for the taxes assessed upon the demised premises for the years 1872, 1873, 1874 and 1875. The plaintiff requested the defendant to defend the action; but, as he did not do so, the plaintiff defended it, and judgment was recovered against him in the sum of \$392 damages, and \$24.32 costs.

The plaintiff asked the judge to rule that the assignment of the defendant to Carney was not operative against the plaintiff in this action, he having no notice or knowledge of the same, and it not being recorded until June 14, 1877; and that the defendant was liable for all the taxes which the plaintiff had paid.

The judge refused so to rule; and ruled that the defendant was only liable for the tax for the year 1872; and ordered judgment accordingly. The plaintiff alleged exceptions.

ENDICOTT, J. It is clear that the plaintiff was liable to the lessor upon the covenants of the lease for the payment of taxes for the years 1872, 1873, 1874, 1875; although he had assigned all his right, title and interest in the lease to the defendant in 1870, which assignment was under seal and duly acknowledged and recorded. The defendant, as assignee, would also be liable to the lessor for the taxes accruing during his term, by virtue of the privity of estate created by the assignment. In such a case, the liability of the original lessee does not depend upon privity of estate, for he has parted with his whole interest, but upon privity of contract, and continues during the whole term; while the liability of the assignee continues only during the term he holds the legal title to the leasehold estate under his assignment. When the privity of estate thus ceases, his liability to the lessor ceases. *Farrington v. Kimball*, 126 Mass. 313, and cases cited. See *Howland v. Coffin*, 9 Pick. 52.

The plaintiff, being thus liable, was sued by the legal representative of the lessor for these unpaid taxes, and judgment having been rendered against him for the whole amount, he paid the same.

That a lessee can recover from his assignee, and also from a second assignee, the taxes accruing during their terms respectively, and which the lessee has been obliged through their default to pay to the lessor, is well settled. *Patten v. Deshon*, 1 Gray, 325; *Burnett v. Lynch*, 5 B. & C. 589; *Moule v. Garrett*, L. R. 5 Ex. 132; s. c. 7 Ex. 101; *Farrington v. Kimball*, *ubi supra*. The question presented in this case is whether the plaintiff is entitled to recover from the defendant, not only the taxes for 1872, when the defendant was actually in possession, but also the taxes for the following years, when Carney was in possession, to whom the defendant had transferred the lease in 1873 by an assignment, not recorded until 1877. The lease was for the term of fifteen years from January 1, 1870.

The assignee of a lessee takes the whole estate of the lessee in the premises, subject to the performance on his part of the covenants running with the land, under the terms of the lease. By accepting and entering under the assignment, the law implies a promise to perform the duties thus imposed upon him. If through his neglect or refusal to perform them, the lessee is obliged to pay rent, taxes or other sums of money to the lessor under the covenants of his lease, he may recover the same from his assignee. Whether the lessee may recover from his assignee such sums as he has been obliged to pay, arising out of the default of a second assignee to whom the first assignee has assigned all his interest, presents a very different question, in the absence of an express agreement to do so in the instrument of assignment. For the implied promise to perform the duty

imposed upon him by the acceptance of the assignment must be limited to the time while he holds the estate under the assignment, and while, by virtue of his privity of estate with the lessor, he is liable to him for the performance of the covenants. In other words, the implied promise cannot include the payment of any sums, except those which as assignee he assumes, and for which, when he assigns the lease, he is no longer liable to the lessor. *Wolveridge v. Steward*, 1 Cr. & M. 644.

The presiding judge, therefore, rightly ruled that the defendant was only liable to the plaintiff for the tax of 1872.

It is immaterial that the assignment by the defendant to Carney was not recorded. The provisions of the Gen. Sts. c. 89, § 3, have no application here; and the failure of Carney to record the assignment cannot affect the rights or liability of the defendant in this case. See *Parsons v. Spaulding*, 130 Mass. 83.

*Exceptions overruled.*

NOTE. — See, *accord*, *Bender v. George*, 92 Pa. 36. As to the right of an assignee to rid himself of future liability by making a further assignment, see *Johnson v. Sherman*, 15 Cal. 287; *Hintze v. Thomas*, 7 Md. 346; *Washington Gas Co. v. Johnson*, 123 Pa. 576.

## SECTION 2.

## WHERE THERE IS NO TENURE.

## LYON v. PARKER.

45 Me. 474. 1858.

**ACTION OF COVENANT BROKEN.** In his writ, which is dated December 1, 1856, the plaintiff declares, in substance, that on the 4th day of April, 1849, the defendant by his deed, for a valuable consideration, received of Abner Coburn and others (named), owners of mills, dams and water power on Skowhegan Falls, bound and obliged himself to, and with each of the before-named persons, and to and with each of the grantees of either and all of them, and therein and thereby covenanted and agreed jointly and severally with each and all of the before-named persons, and with each and all of the grantees of either and all of them, that he would build a dam from, etc., and would keep the same in perfect repair for the term of twenty years.

That plaintiff afterwards became part owner, by purchase from Abner Coburn and others, of a paper mill and of a saw mill, and of the water power aforesaid; that defendant has failed to perform his covenants, whereby the said plaintiff has been damnified.

**APPLETON, J.** It appears that the defendant, on April 4, 1849, by his bond of that date, "became bound and obliged jointly and severally," to Abner Coburn and others, "owners of mills, dams and water power on Skowhegan Falls," and also "unto the *grantees* of either or all of them" (naming the obligees in the bond), "to complete, maintain and keep in good and perfect repair, at all times, for and during twenty years from the first of April, A.D. 1849, said dam," etc., etc.

The plaintiff, as grantee of some of the obligees named in the bond, brings this action to recover damages for the injuries he has sustained by reason of the defendant's failure to perform his covenants.

It is a familiar principle of law, that a bond or contract under seal cannot be assigned so as to enable the assignee to maintain an action in his own name. If the bond had been made to Coburn and others, and their assigns, it would not be pretended that an assignee could maintain an action on it in his own name. It does not strengthen the plaintiff's right of action because his only claim as assignee arises not from an assignment upon the bond, but by deed, from some of the assignees.

The defendant is a stranger to the title. He contracts with certain

individuals to do work upon a dam belonging to the obligees in the bond. The covenant is personal. There is no privity of contract between the plaintiff and the defendant, for the plaintiff was no party to the bond when it was executed.

Neither is there any privity of estate. "It is not sufficient," says Lord KENYON, in *Webb v. Russell*, 3 T. R. 402, "that a covenant is concerning the land, but in order to make it run with the land, there must be a privity of estate between the covenanting parties." There being neither privity of contract nor of title, the action is not maintainable. *Plymouth v. Carver*, 16 Pick. 183; *Hurd v. Curtis*, 19 Pick. 458.

*Plaintiff nonsuit.*

TENNEY, C.J., RICE, CUTTING, MAY, and GOODENOW, JJ., concurred.

NOTE. — See *Martin v. Drinan*, 128 Mass. 515.

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### SHABER v. ST. PAUL WATER CO.

30 Minn. 179. 1883.

BERRY, J. In January, 1869, John R. Irvine and Nancy Irvine owned certain land (in the city of St. Paul), through which ran Phalen Creek, affording a valuable mill privilege thereon. Leonard Schiegel, as the lessee of the Irvines, had constructed a dam and race upon the land, by which the mill privilege was utilized in the running of a flour mill, which he had also erected thereon and was operating. By sundry subsequent conveyances the land, with the race, dam, mill, and privilege, came to Henry Shaber, the plaintiff's intestate, and the same are now part of his estate. The defendant corporation, the St. Paul Water Company, was formed to supply the city of St. Paul with water. In January, 1869, the company, in carrying out this purpose of its creation, was about to tap Lake Phalen and lay pipes by which to divert and draw off the water thereof. Phalen Creek flows from Lake Phalen, which is the last and lowest of a chain or series of lakes, constituting a local water system. The Irvines and Schiegel objected to the proposed diversion of water, refused to permit it, and threatened to enjoin it, because, unless provision was made for bringing into Lake Phalen, from other sources and by artificial means, as much water over and above what naturally flowed into the same as the company should at any time draw out, the level of the lake would be lowered, the quantity of water flowing into the creek diminished, and the mill privilege impaired and destroyed.

To remove the opposition, and to induce them to refrain from enjoining its proceedings, the company entered into a written agree-

ment, by which, "for a good and valuable consideration," it covenanted and agreed with the Irvines and Schiegel, "their heirs and assigns, severally and separately," that it would make certain specified "improvements," such as dams, gates, canals, and channels, all within one year from the 8th day of February, 1869; that it would at all times thereafter keep and maintain the same in a "good, strong, and substantial manner," and that it would do and refrain from doing certain other things, all having reference to maintaining the supply of water in the creek; and further, that the volume of water flowing out of Lake Phalen through Phalen Creek should never at any time be diminished or rendered less available for the purpose of the water-power mill privilege before mentioned, by any work or operation of the company, than it had been before it commenced its operations; that it would never draw or take out of the lake at any time any more water than such quantity as it should introduce into the same by its said improvements and by artificial means over and above the quantity which naturally flowed into the same; and that it would, by its said improvements and by artificial means, introduce and lead into the lake at all times as large a volume of water as it should draw out, in addition to what flowed into the lake through natural channels. The plaintiff alleges that defendant has failed to make the specified "improvements," and that it has broken its covenants in reference to maintaining the stage and quantity of water in the creek, and that, in consequence of said failure and breaches, the flow of water in the creek has been diminished by the drawing and diverting of water by defendant from Lake Phalen, and thereby the said Shaber, in his lifetime, and his estate since his decease, has been greatly damaged (as particularly set forth) in respect to the mill, water privilege, and the use and operation of the same, and that he and his estate have been subjected to great expense and loss on account thereof. This appeal is taken from an order overruling defendant's general demurrer to the complaint.

Our examination of the case has brought us to the conclusion that the appeal presents a single question, viz.: Whether any of the covenants entered into by defendant run with the land of the covenantees to Shaber and his estate? This is a pure common-law question, to be decided upon the authorities.

We think the following propositions embody the rules of law applicable to the case, and that they are supported by the authorities cited: A covenant runs with land when either the liability to perform it, *i.e.*, its *burden*, or the right to take advantage of it, *i.e.*, its *benefit*, passes to the assignee of the land. *Savage v. Mason*, 3 Cush. 500; 1 Smith, Lead. Cas. 120.

To enable a covenant to run with land so as to give the assignee its *benefit*, the covenantee must be the owner of the land to which the covenant relates; but the covenantor may be either a person in

privity of estate with the covenantee, or a stranger; while, with reference to the subject of the covenant, it is sufficient that it be for something to be done, or refrained from, about, touching, concerning, or affecting the covenantee's land (though not upon it), if the thing covenanted for be for the benefit of the same, or tend to increase its value in the hands of the holder. *Spencer's Case* and notes, Eng. & Amer., 1 Smith, Lead. Cas. (7th Am. Ed.) 115, where all the learning upon the subject appears to be collected; *Packenham's Case*, 42 Edw. III. 3, abstracted in 1 B. & C. 410, 415; Anson on Contracts, \*220; Pollock on Contracts, 219; Rawle on Covenants, 334, and notes; *Norman v. Wells*, 17 Wend. 136; *Norfleet v. Cromwell*, 70 N.C. 634; 1 Smith, Lead. Cas. 122, 124, 139, 140, 175, 177, 181, 183; *Allen v. Culver*, 3 Denio, 284; *Van Rensselaer v. Smith*, 27 Barb. 104, 146; *Nat. Bank v. Segur*, 39 N.J. Law, 173.

The case at bar is controlled by these principles. The Irvines — the covenantees — were the owners of the land to which the defendant's covenants related; that is to say, they owned the mill-site upon which was the water privilege which it was the object and purpose of the covenants to preserve and protect; and the covenants were for something to be done, and to be refrained from, about, touching, concerning, and affecting the covenantees' land, for the benefit thereof, and tending to increase its value in the hands of the holder. The covenants were of a character to run with the land, so as to enable the assignee of the covenantees to take advantage of them. When it is considered what it was that the water company proposed to do, and for what purpose the covenants were made, it would be astonishing if this were not the case. The diverting the water of Lake Phalen, without provision for counteracting it, would be a perpetual injury to the land of the covenantees. No protection against such an injury would be adequate unless it was also perpetual. That nothing less could have been fairly intended by the parties to the covenants is apparent from the allegations of the complaint.

It is insisted by defendant that the breach of the covenants was complete before plaintiff had acquired any interest in the property to which they related; that it had become a right of action, and did not pass to the plaintiff. If the covenants to make the specified improvements within a year from February 8, 1869, were all the covenants entered into, this point might possibly be well taken. But such is not the case. These improvements are not only to be made, but at all times thereafter to be kept and maintained in a "good, strong, and substantial manner," and the volume of water flowing out of Lake Phalen through the creek is to be maintained undiminished by any of the operations of the defendant, with other covenants of similar import. These are, therefore, continuing covenants, and for that reason, and because they run with the land, the damages from their breach accrue to him who holds the property when the

breach occurs — or, in other words, to the person injured — and to him the right of action therefor necessarily belongs. *Jeter v. Glenn*, 9 Rich. (S.C.) Law, 374. In this respect they are analogous to covenants for quiet enjoyment and warranty, which inure to the protection of the owner for the time being of the estate which they are intended to assure. Rawle on Covenants, 352, and citations. The covenants relating to the making of the specified "improvements" provide for the means by which a certain result is to be accomplished, while these continuing covenants provide for the result itself. The latter are, therefore, the most important, because they go to the substance rather than the form in which the result in view is to be accomplished. If the continuing covenants are kept, the damages for the breach of the others would be comparatively, if not altogether, nominal. For these reasons we are of opinion that the complaint states a cause of action, and that the demurrer was, therefore, properly overruled.

NOTE. — In *National Bank v. Segur*, 39 N.J. L. 173, the court said (p. 184): "It is not easy to see why any contract, which is of a nature to attach to the land, and which has a beneficial tendency, should not be considered assignable, by act of law, as against the covenantor, with the title. In every instance where the question, in this form, is presented, the suit being between the original covenantor and the alienee of the covenantee, if the making of the covenant be not denied, the sole point for solution would seem to be whether such covenant, in the legal sense, relates to or concerns the land." And see *St. Louis Ry. v. O'Baugh*, 49 Ark. 418; *Randall v. Latham*, 36 Conn. 48; *Savage v. Mason*, 3 Cush. (Mass.) 500; *Ford v. Oregon Ry. Co.*, 60 Or. 278; *Lydick v. Baltimore R.R. Co.*, 17 W.Va. 427; *Tennant v. Tennant*, 69 W.Va. 28.

Of course the benefit will not run if that would be contrary to the intent of the parties to the covenant. See *Cole v. Hughes*, 54 N.Y. 444.

It is to be noted that in all jurisdictions the benefit of some covenants for title run with the land. But this is a topic outside the scope of this book.

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### AUSTERBERRY v. OLDHAM.

L. R. 29 Ch. D. 750. 1885.

ELLIOTT, by deed, conveyed for value to trustees in fee a piece of land as part of the site of a road intended to be made and maintained by the trustees under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company established to raise the necessary capital for making the road); and



in the conveyance the trustees covenanted with Elliott, his heirs and assigns, that they, the trustees, their heirs and assigns, would make the road and at all times keep it in repair, and allow the use of it by the public subject to tolls. The piece of land so conveyed was bounded on both sides by other lands belonging to Elliott. The trustees duly made the road, which afforded the necessary access to Elliott's adjoining lands. Elliott afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendants, both parties taking with notice of the covenant to repair.

LINDLEY, L.J. The first question which I will consider is whether that covenant runs with the land, as it is called — whether the benefit of it runs with the land held by the plaintiff, and whether the burden of it runs with the land held by the defendants; because, if the covenant does run at law, then the plaintiff, so far as I can see, would be right as to this portion of his claim. Now, as regards the benefit running with the plaintiff's land, the covenant is, so far as the road goes, a covenant to repair the road; what I mean by that is, there is nothing in the deed which points particularly to that portion of the road which abuts upon or fronts the plaintiff's land — it is a covenant to repair the whole of the road, no distinction being made between the portion of that road which joins or abuts upon his land and the rest of the road; in other words, it is a covenant simply to make and maintain this road as a public highway; there is no covenant to do anything whatever on the plaintiff's land, and there is nothing pointing to the plaintiff's land in particular. Now it appears to me to be going a long way to say that the benefit of that covenant runs with the plaintiff's land. I do not overlook the fact that the plaintiff as a frontager has certain rights of getting on to the road; and if this covenant had been so worded as to shew that there had been an intention to grant him some particular benefit in respect of that particular part of his land, possibly we might have said that the benefit of the covenant did run with this land; but when you look at the covenant it is a mere covenant with him, as with all adjoining owners, to make this road, a small portion of which only abuts on his land, and there is nothing specially relating to his land at all. I cannot see myself how any benefit of this covenant runs with his land.

But it strikes me, I confess, that there is a still more formidable objection as regards the burden. Does the burden of this covenant run with the land so as to bind the defendants? The defendants have acquired the road under the trustees, and they are bound by such covenant as runs with the land. Now we come to face the difficulty; does a covenant to repair all this road run with the land — that is, does the burden of it descend upon those to whom the road may be assigned in future? We are not dealing here with a case of landlord and tenant. The authorities which refer to that class of cases have little, if any, bearing upon the case which we have to consider, and I

am not prepared to say that any covenant which imposes a burden upon land does run with the land, unless the covenant does, upon the true construction of the deed containing the covenant, amount to either a grant of an easement, or a rent-charge, or some estate or interest in the land. A mere covenant to repair, or to do something of that kind, does not seem to me, I confess, to run with the land in such a way as to bind those who may acquire it.

It is remarkable that the authorities upon this point, when they are examined, are very few, and it is also remarkable that in no case that I know of, except one which I shall refer to presently, is there anything like authority to say that a burden of this kind will run with the land. That point had often been discussed, and I rather think the conclusion at which the editors of the last edition of Smith's *Leading Cases* have come to is right, that no case has been decided which does establish that such a burden can run with the land in the sense in which I am now using that expression. The case of *Holmes v. Buckley*, 1 Eq. C. Ab. 27, looks a little like it at first; but the observation to be made on that case I think is this: In the first place it is quite plain that there the plaintiff had a cause of action; he was entitled to an injunction of some sort to restrain the defendants from interrupting his watercourse. The right of the plaintiff to enforce specifically the covenant to repair, or rather to cleanse the watercourse, is obscure, and we have not got the decree which was pronounced; and I confess that having only that short note of it which is to be found in "*Equity Cases Abridged*," I fail to understand the exact grounds of that decision, specifically enforcing that covenant to cleanse. I doubt whether it was a decision to that effect; but the case is too loosely reported to be a guide on the point.

*Morland v. Cook*, Law Rep. 6 Eq. 252, another case in which it was said that the covenant ran with the land, is intelligible on this ground — that there was there that which amounted to the creation of a rent-charge for the repair of the sea wall which was in question. That is intelligible enough, and if the covenant in the present case amounted to anything of the kind, of course the observations I am now making would not be applicable.

The case before Vice-Chancellor MALINS of *Cooke v. Chilcott*, 3 Ch. D. 694, has been so shaken that I cannot rely upon it as an authority at all. I think the Vice-Chancellor did intimate an opinion that the covenant there would run with the land. I confess I doubt the correctness of that opinion. He decided the case upon another point, and upon that other point only has it been followed. There is no other authority that I am aware of that such a covenant as this runs with the land, unless it is *Western v. Macdermott*, Law Rep. 1 Eq. 499; 2 Ch. 72, where the Court of Appeal did not sanction the notion that the covenant in that case ran with the land, although the covenant was a purely restrictive covenant. I am not aware of any other case

which either shews, or appears to shew, that a burden such as this can be annexed to land by a mere covenant, such as we have got here; and in the absence of authority it appears to me that we shall be perfectly warranted in saying that the burden of this covenant does not run with the land. After all it is a mere personal covenant. If the parties had intended to charge this land for ever, into whose-soever hands it came, with the burden of repairing the road, there are ways and means known to conveyancers by which it could be done with comparative ease; all that would have been necessary would have been to create a rent-charge and charge it on the tolls, and the thing would have been done. They have not done anything of the sort, and, therefore, it seems to me to shew that they did not intend to have a covenant which should run with the land.

NOTE. — There is a dictum, *accord*, in *Brewer v. Marshall*, 19 N.J. Eq. 537, 545.

If covenants touching the land may not properly be held to be within the scope of the recording acts, it is submitted that the doctrine of the principal case should be followed. See *Sjoblom v. Mark*, 103 Minn. 193, and *Railway v. Bosworth*, 46 Ohio St. 81.

The question would still remain whether the burden of the covenant should run in equity against an assignee of the covenantor who was not a *bona fide* purchaser. But this is a topic outside the scope of this book.

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### MORSE v. ALDRICH.

19 Pick. (Mass.) 449. 1837.

THIS was an action of covenant. The cause was tried before PUTNAM, J.

In 1794, Stephen Cook, the defendants' ancestor, conveyed to William Hull, in fee, a tract of land in Watertown, containing about thirteen acres; with the privilege of using and improving the land and mill pond west of the same tract, for the purpose of fish ponds, baths, etc., within certain bounds described, including a portion of the grantor's mill pond; and the "full liberty of ingress, egress, and regress to and from any part of the said described land and water, to dig out and carry away the whole or any part of the soil, etc.; to build such causeways and dams as may be necessary to divide the same into six separate and distinct fish ponds."

Hull conveyed the same premises to the plaintiff.

Afterward, in November, 1809, an agreement under seal was made by and between Cook and the plaintiff, in which, in consideration of the covenants on the part of the plaintiff, Cook covenants with the

plaintiff, his heirs and assigns, "that he will draw off his said pond when thereto requested by said Morse, in the months of August and September, not exceeding six working days in the whole, in each year, for the purpose of giving said Morse an opportunity of digging and carrying out mud, etc., as long as there may be mud in said pond, and no longer." It was upon this clause that the present action was brought. In the same agreement are other covenants, some concerning Morse's land and Cook's mill pond, and some concerning the discontinuance and costs of certain actions then pending between Cook and Morse. Cook does not covenant, in express terms, for his heirs or assigns.

It was contended by the plaintiff that the covenant above recited was a covenant running with the land, and therefore binding upon the defendants, who derive their title to their estate as heirs of Cook, as to four fifths thereof, and as assignees by quitclaim, of one of his heirs, as to the other fifth. And this construction was supported at the trial, against the objection of the defendant. The plaintiff claimed the right to take the mud, etc., for the purpose of manuring his land.

The plaintiff requested the defendants to draw off the pond in September, 1835, in order that he might get out the mud, but the defendants refused.

WILDE, J. The defendants are charged, as the heirs of Stephen Cook, their ancestor, with the breach of a covenant made by him with the plaintiff, and the question submitted to the court is, whether this covenant is such as is binding upon the heirs of the covenantor. And the decision of this question depends on another, namely, whether the covenant is a real covenant, running with the land, which the defendants inherit from their ancestor, the covenantor.

It is generally true, as has been argued by the defendants' counsel, that, by the principles of the common law, the heir is not bound by the covenant of his ancestor, unless it be stipulated by the terms of the covenant, that it shall be performed by the heir; and unless assets descend to him from his ancestor sufficient to answer the charge. *Platt on Cov.* 449; *Dyer* 14 a, 23 a; *Barber v. Fox*, 2 Saund. 136. If therefore the heir be not named in the covenant, it will be binding only on the covenantor, his executors and administrators, although the heir may take by descent from the covenantor assets sufficient to answer the claim.

But this principle is not to be applied to real covenants running with the land granted or demised, and to which the covenants are attached for the purpose of securing to the one party the full benefit of the grant or demise, or to the other party the consideration on which the grant or demise was made. Such covenants are said to be inherent in the land, and will bind the heir or the assignee though

not named. For as he is entitled to all the advantages arising from the grant or demise, it is but reasonable that he should sustain all such burdens as are annexed to the land. Platt on Cov. 65.

When a covenant is said to run with the land, it is obviously implied that he who holds the land, whether by descent from the covenantor, or by his express assignment, shall be bound by the covenant. The heir may be charged as an assignee, for he is an assignee in law, and so an executor may be charged as the assignee of the testator. *Derisley v. Custance*, 4 T. R. 75; Jac. Law Dict. *Assigns*. And a devisee may be charged in the like manner, and is entitled to the benefit of any covenant running with the land. *Kingdon v. Nottle*, 4 Maule & Selw. 53.

If then the covenant in question runs with the land, it is clear that the defendants are liable; and it is immaterial whether the heirs and assigns of the covenantor are named in the covenant, or not, *quia transit terra cum onere*. *Bally v. Wells*, 3 Wils. 29.

To create a covenant which will run with the land, it is necessary that there should be a privity of estate between the covenantor and covenantee. *Spencer's Case*, 5 Co. 16; *Cole's Case*, Salk. 196; 3 Wils. 29; *Webb v. Russell*, 3 T. R. 402; *Keppell v. Bailey*, 2 Mylne & Keen, 517; *Vyvyan v. Arthur*, 1 Barn. & Cressw. 410. In these cases, and in most of the cases on the same subject, the covenants were between lessors and lessees; but the same privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant, or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee.

This principle is decisive of the present action. It appears by the deed of Stephen Cook, the defendants' ancestor, to William Hull, that the former conveyed to the latter a tract of land adjoining the mill pond in question, "with the full and free privilege of using and improving the said mill pond within certain limits, with the full liberty of ingress and egress, to dig out and carry away the whole or any part of the soil in said pond, and to divide the same pond, as described in the deed, into six separate and distinct fish ponds."

William Hull conveyed the premises to the plaintiff; after which, disputes arose between Cook and the plaintiff relative to their respective rights, and for settling the same they entered into sundry covenants in relation to said grant, and qualifying the same; for the breach of one of which this action was brought. At the time these covenants were made, there was a privity of estate between the parties in that part of the mill pond described in the grant to Hull. The covenant in question was made in reference to the plaintiff's right and interest under that grant, and was manifestly intended to confirm it, and to secure the plaintiff in the enjoyment thereof. This

covenant therefore, upon the principles stated, is a real covenant, running with the land, and is binding on the heirs of the covenantor.

*Judgment on the verdict.*

NOTE. — For other authorities that the burden of a covenant in aid of an easement runs with the land, see *Farmers Co. v. New Hampshire Co.*, 40 Col. 467; *Fitch v. Johnson*, 104 Ill. 111; *Nye v. Hoyle*, 120 N.Y. 195; *Norfleet v. Cobb*, 64 N.C. 1; *Carr v. Lowry's Adm'x*, 27 Pa. 257. See, *contra*, *Smith v. Kelley*, 56 Me. 64.

*Hannen v. Ewalt*, 18 Pa. 9. An action of covenant is maintainable against the assignees of land subject to a ground rent for rent accruing while they were owners of such land.

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### ROCHE v. ULLMAN.

104 Ill. 11. 1882.

THIS is an appeal from a judgment of the Appellate Court for the First District, affirming a decree of the Superior Court of Cook County, wherein the appellant, Walter P. Roche, is charged personally, as the assignee of William M. Butler, with one-half the cost of a party wall constructed by appellee, under a written contract with Butler, upon the dividing line between adjacent lots in the city of Chicago, belonging, respectively, to Butler and appellee.

In 1872, Joseph Ullman, the appellee, owned the west half of the west half of lot 2, block 31, original town of Chicago, and William M. Butler owned the east half of the west half of the same lot. July 16, 1872, Ullman and Butler made the following party wall agreement:—

“This agreement, made and entered into this 16th day of July, A.D. 1872, between Joseph Ullman, of the city of Chicago, State of Illinois, party of the first part, and William M. Butler, of the same city and State, party of the second part:—

“Witnesseth: Whereas, said party of the first part is the owner in fee simple of the following described lot or parcel of land in the city of Chicago, county of Cook, State of Illinois: the west quarter of lot number two (2), of block thirty-one (31), in the original town (now city) of Chicago; and whereas, said party of the second part is owner in fee simple of the east half of the west half of lot number two (2), of block thirty-one (31), in the original town (now city) of Chicago; and whereas, said party of the first part is about to erect a brick wall, with a good and substantial foundation of stone, on the division line of said two parcels of land above named, four stories high above the basement, and one hundred and sixty feet from front to rear, the wall basement to be twenty inches thick, wall of first and second stories

to be sixteen inches thick, wall of third and fourth twelve inches thick to top of battlement wall, is to extend eighteen inches above the roof of said proposed buildings; and whereas, said wall is to be built one-half on said east one-half of the west one-half of lot 2, block 31, and said other one-half of wall is to be built upon the west one-fourth of said lot 2, block 31, original town; and, whereas, both of said party owners desire to use and own said wall as a party wall and for common benefit: — It is hereby mutually covenanted and agreed that said wall, of the size and dimensions above described, the division line of the said above-described parcels of land being the center of said wall, and said second party should have the right, at any time, to use said wall, or any part thereof as he may need, as a party wall for any building erected upon his said east half of west half of lot 2, block 31, original town, provided said second party shall first pay said party of the first part the then market value of said wall, or such part of said wall as he, the said party of the second part, may want or use. It is further agreed that the wall shall be ledged out four inches at each resting for the floor joists of each and every story of said building. It is also further agreed that the party of the second part will be to the expense of one-half of all the area walls, both front and rear, upon like conditions of the foregoing contract for building walls. It is also further agreed that all the covenants and agreements herein contained shall be binding upon each party, their heirs, executors, administrators and assigns, and grantees of the said parties of the first and second part, and shall be so construed as to run with the land.

“In witness whereof the said parties have hereunto set their hands and seals, the day and year above written.

“JOS. ULLMAN, [seal.]  
“WILLIAM M. BUTLER. [seal.]”

This agreement was recorded in the recorder's office of Cook County, August 2, 1872. Ullman built the wall. Roche acquired the land of Butler, made use of the wall, and declined to pay any part of its cost.

MR. JUSTICE MULKEY delivered the opinion of the court.

By the agreement between Butler and Ullman the latter was authorized to build a party wall, the east half of which was to rest on Butler's part of the lot, and the west half on Ullman's, and it was expressly provided that when so built, Butler, upon payment of one-half the cost of its construction, should have the right to use the same, or such part of it as he might need, as a party wall for any building he might erect on his part of the lot. The legal effect of this agreement, upon its performance, was to give to each of the parties an easement on the other's lot for the purpose of support of their respective buildings, which became appurtenant to their several estates, and as such would pass to their respective assignees by any mode of conveyance

that would transfer the land itself. That such would have been the effect of the agreement had it been executed on the part of Butler, is not questioned. But it is claimed that Roche, his assignee, occupies a better position with respect to the agreement than Butler, through whom he claims, — that while he may avail himself of all its benefits, he is relieved of all obligations to perform its burdens. If this be the correct view, it must be conceded it results solely from the fact the parties to the agreement had no power to impose its burdens as well as its benefits upon their assignees, for nothing can be clearer than it was their intention to do so, and it is equally clear the terms expressive of such intention are altogether appropriate and sufficient for that purpose, if, as matter of law, they had power to thus bind their assignees. The language of the agreement expressive of such intention is: "It is also further agreed, that all the covenants and agreements herein contained shall be binding upon each party, their heirs, executors, administrators and assigns, and grantees of the said parties of the first and second part, and shall be so construed as to run with the land." There can be no mistaking the object and purpose which the parties sought to accomplish by this provision, and appellant, having bought with constructive, and doubtless actual, notice of it, must be presumed to have intentionally assumed the burdens as well as the benefits of the agreement. The duty of paying for one-half the wall being a continuing liability resting upon the owner of the lot in his character of owner, and this not having been paid at the time of appellant's purchase, it is to be presumed that in becoming a purchaser, and thus assuming the relation of owner himself, he paid less for the property by the amount of the incumbrance than he otherwise would have done. Such being the case, it would now be highly inequitable to permit him to enjoy the benefit of the wall without reimbursing Ullman for one-half its cost.

But outside of the equitable view here suggested, we think the law is with appellee on other grounds. While the authorities are not altogether harmonious with respect to the legal effect of covenants and agreements providing for the construction of party walls between adjacent proprietors, yet we think the decided weight of authority establishes the position that an agreement under the hands and seals of such parties, containing covenants and stipulations like those found in the instrument we are considering, will, when duly delivered and acted upon, as was done in this case, create cross-easements in the respective owners of the adjacent lots with which the covenants in the agreement will run, so as to bind all persons succeeding to the estates to which such easements are appurtenant. This being so, it follows that Roche, in succeeding to the east half of the lot, whereby he acquired an easement in the west half, became bound for the performance of the covenant to pay one-half the cost of constructing the wall. We do not deem it necessary to enter upon



a review of the authorities upon this subject, but will content ourselves with a reference to the following cases, which are believed to sustain the conclusion reached: *Keteltas v. Penfield*, 4 E. D. Smith (N.Y.) 122; *Savage v. Mason*, 3 Cush. (Mass.) 504; *Mame v. Cumston*, 98 Mass. 317; *Standish v. Lawrence*, id. 111; *Dorsey v. St. Louis, Alton and Terre Haute R.R. Co.*, 58 Ill. 68; *Sterling Hydraulic Co. v. Williams*, 66 id. 397; *Rindge v. Baker*, 57 N.Y. 209; note to *Spencer's Case*, Smith's Leading Cases (6th Am. ed.) 211; *Weyman's Exrs. v. Ringold*, 1 Bradf. 40; *Giles v. Dugro*, 1 Duer 331.

The decision in *Goodrich v. Lincoln*, 93 Ill. 359, does not conflict with the conclusion reached in the present case.

We concede the general doctrine, as contended for by appellant's counsel, that where the relation of landlord and tenant does not exist, only such covenants as are beneficial to the estate will run with the land, but we do not regard the doctrine as applicable to cases where adjacent proprietors have, as in the present case, so contracted as to create mutual easements upon each other's estates, and entered into covenants with respect to the same. The new relation thus created being of an intimate character, involving reciprocal duties with respect to each other's estates, may be regarded as an equivalent for the absence of tenure, so as to give effect to all covenants without regard to whether they are beneficial or onerous. However this may be, it is clear the rule contended for does not seem to be applied in this class of cases.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

NOTE. — See, *accord*, *Conduitt v. Ross*, 102 Ind. 166; *Maine v. Cumston*, 98 Mass. 317; *Adams v. Noble*, 120 Mich. 545; *National Life Insurance Co. v. Lee*, 75 Minn. 157; *Sharp v. Cheatham*, 88 Mo. 498; *Stehr v. Raben*, 33 Neb. 437; *Parsons v. Baltimore Ass'n*, 44 W.Va. 335. See also *Irving v. Turnbull*, [1900] 2 Q.B. 129.

But *cf.* *Pfeiffer v. Matthews*, 161 Mass. 487; *Lincoln v. Burrage*, 177 Mass. 378; *Cole v. Hughes*, 54 N.Y. 444; *Sebald v. Mulholland*, 155 N.Y. 455.

*Gilmer v. Mobile Ry. Co.*, 79 Ala. 569. A conveyed land to a railroad company. A had a right to cultivate the land so conveyed which was not needed for use by the company. The company covenanted to erect a flag-station, and the court held the assignee of the company bound by such covenant. The grantor "retained the right to cultivate [the land] under certain conditions and circumstances; thus retaining an interest in the realty which would preserve the privity of estate in it, and to which the covenant of defendant would attach, or become annexed."

*Batavia Mfg. Co. v. Newton Wagon Co.*, 91 Ill. 230, 248. A granted land to B, and A covenanted to repair a dam on land not granted.

B had a right to enter on A's land to make the repairs, if they were not duly made. It was held that the assignee of A was bound by such covenant.

*Doty v. Railroad*, 103 Tenn. 564. A granted an easement in land to a railroad company, and the company covenanted to run daily trains over the land so granted. It was held that the assignee of the company was bound by such covenant.

*Wooliscroft v. Norton*, 15 Wis. 198. A covenanted to pay part of the expenses of repairing a dam. B, the covenantee, had a right to shut off water running to A's land, if such payment were not made. It was held that the assignee of A was bound by such covenant.

But, even where there is privity of estate within the doctrine of the cases cited above, of course the burden of the covenant will not run, unless the covenant touches the land. See *Wiggins Ferry Co. v. Ohio Ry. Co.*, 94 Ill. 83 (A granted an easement to a railroad company, and the company covenanted to make a specified use of a ferry belonging to A); *Dickey v. Railway Co.*, 122 Mo. 223 (A granted an easement to a railroad company, and the company covenanted that A should forever have free transportation over the railroad); *Eddy v. Huinant*, 82 Tex. 354 (same); *Kettle River R.R. Co. v. Eastern Ry. Co.*, 41 Minn. 461 (A granted an easement to a railroad company, and covenanted to make specified shipments over the railroad).

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### HURD v. CURTIS.

19 Pick. (Mass.) 459. 1837.

ACTION of covenant. The declaration recites, that, in 1816, an indenture of four parts was made between Simon Eliot and Solomon Curtis, of the first part, Moses Grant, of the second, Hurd, the plaintiff, and Charles Bemis, of the third, and John Ware, of the fourth, owners of the mills and mill privileges on the upper dam of Newton Lower Falls, to wit, two paper-mills and a saw-mill, with their mill privileges, on the Needham side of the river, and four paper-mills, one fulling-mill and one saw-mill with their mill privileges, on the Newton side, for the purpose of fixing the quantity of water which the several parties should have a right to draw at their respective mills and mill privileges, to regulate the use of the same, and for some other purposes therein set forth, did for themselves, their heirs, administrators and assigns, respectively covenant and agree to and with each other and their respective heirs, administrators and assigns, that the six paper-mills and the fulling-mill, should have the first and exclusive right to the use of the water, when no more ran to the paper-mills and fulling-mill then erected and used, or that might be erected and used on the six paper-mill privileges

and fulling-mill privilege, than should be necessary to work them to advantage, and that the saw-mill owned by Hurd and Bemis should have the second right of water, or the first right to the overplus water; that all the paper-mills and the fulling-mill, then erected or that might be erected, should be altered and built with breast-wheels, each for a power equal to carrying two paper engines, in the paper-mills, and for a power equal to carrying a fulling and wool-carding machine, in the fulling-mill; that all the gates of all the mills, or breast-wheels, should be drawn from the same level, and should be on a level with some permanent mark, to be made by consent of the parties; that the respective parties, and their heirs and assigns, should have a right to substitute and erect any other mills, works or machinery, in the place of those then erected, provided the new mills, works and machinery should require no greater power than the mills, works and machinery which the parties had a right to erect and use by virtue of the indenture. The declaration then avers that, at the time of the making of the indenture, the plaintiff was the owner of one undivided half of the saw-mill on the Newton side, and of the first right to the overplus water, and that Bemis was the owner of the other undivided half; that in 1817, Bemis conveyed his half to the plaintiff; that the two paper-mills and paper-mill privileges on the Newton side, which belonged to Eliot and Solomon Curtis, and the fulling-mill, with the privilege of water to work a fulling and wool-carding machine, which belonged to Ware, have since the making of the indenture been conveyed to the defendants, and these two paper-mill privileges and the fulling-mill privilege have, for eleven years last past, been used and occupied by the defendants; that the defendants had due notice and full knowledge of the covenants and agreements in the indenture set forth, on the part of Ware, Eliot and S. Curtis, and their respective heirs, administrators and assigns, to be kept and performed, and that the same are binding upon the defendants; yet that the defendants have erected and used and now use, on their two paper-mill privileges, breast-wheels constructed for a power much more than equal to carrying two paper engines in each of their paper-mills, to wit, for a power equal to carrying six paper engines in each of their paper-mills, and have actually carried the same, and on the fulling-mill privilege they have erected and used breast-wheels for a power more than equal to carrying one fulling and wool-carding machine, to wit, for a power equal to carrying four fulling and wool-carding machines, and have actually carried the same; and have also substituted and actually used, in the place of the mills, works and machinery used on the two paper-mill privileges and the fulling-mill privilege, at the time of the making of the indenture, others which require a much greater power to carry the same than those which the defendants have a right to erect and use thereon by virtue of the indenture; whereby the plaintiff has lost the use and

benefit of his saw-mill and of his first right to the overplus water, as secured to him by the indenture.

The defendants demurred.

WILDE, J. The plaintiff claims damages of the defendants for a breach by them of certain covenants contained in an indenture made by and between the plaintiff and several other persons, who were owners of mills on Charles River, at Newton Lower Falls, so called, the object and intent of the indenture being to limit and regulate the use of the waters of the river at their respective mills. The defendants were not parties to the indenture, but they have since purchased of two of the covenantors their mills mentioned in the indenture, and the question is, whether they are bound as assignees by any of the covenants between the contracting parties, as is alleged in the declaration.

To make a defendant liable to an action of covenant, there must be a privity between him and the plaintiff. *Bally v. Wells*, 3 Wils. 29. As there is no privity of contract between the plaintiff and the defendants, it follows that the defendants are not liable in this action, unless there is a privity of estate between them. Where such a privity exists between the covenantor and the covenantee, and the covenantor assigns his estate, the privity thereby created between the assignee and the other contracting party renders the former liable on all such covenants as regulate the mode of occupying the estate, and the like covenants concerning the same. And so if the covenantee assigns his estate, his assignee will have the benefit of similar covenants. These covenants are annexed to the land and run with it. But if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of any covenants between the contracting parties, although they may relate to the land he takes by assignment or purchase from one of the parties to the contract. In such a case, the covenants are personal and are collateral to the land.

Covenants for title may be considered as an exception to the general rule, and the reason for the exception is very strong; for nothing can be more manifestly just than that the party who loses his land by a defect of title should have the benefit of the covenants which were intended to secure an indemnity for the loss. Such a covenant is dependent on the grant, is annexed to it, as part and parcel of the contract, and runs with the land in favor of the assigns of the grantee or covenantee; but there is no exception to the rule, that no covenant will run with the land so as to bind the assignee to perform it, unless there were a privity of estate between the covenantor and covenantee. "It is not sufficient," as Lord KENYON remarks, in *Webb v. Russell*, 3 T. R. 402, "that a covenant is concerning the land, but in order to make it run with the land, there must be a privity of estate between the covenanting parties." And so the law has been laid

down in all the cases turning on this point, ever since *Spencer's Case*.

A covenant to build a house on the land of a third person is a mere personal covenant; but a covenant to build a house, or a new wall, on the land demised, will run with the land demised and bind the assignee, on account of the privity of estate between the covenanting parties. *Spencer's Case*, 5 Co. 16.

In *Cole's Case*, 1 Salk. 196, a house had been leased, excepting two rooms, and free passage to them. The lessee assigned, and the assignee disturbed the lessor in the passage thereto, and for this disturbance the lessor brought covenant. The action was maintained, because of the privity of estate in the passage; but it is laid down as clear law, that if the disturbance had been in either of the rooms, no action of covenant would have lain, because the rooms were excepted. As to them there was no privity of estate between the parties.

In *Vyryan v. Arthur*, 1 Barn. & Cressw. 410, the owner of a mill, and certain lands, had leased the latter for a term of years, yielding and paying certain rents, and also doing suit to the mill of the lessor, by grinding all such corn there as should grow upon the demised premises; and in an action of covenant brought by the assignee of the lessor of the mill and the reversion of the lands, against the lessee, it was held that the reservation of the suit to the mill was in nature of a rent service, and that the implied covenant to render it was a real covenant which would run with the land so long as the ownership of the mill and the reversion of the demised premises belonged to the same person. It seems to be difficult to reconcile this decision with the second resolution in *Spencer's Case*, and with other cases in which it has been decided that a covenant of a lessee to build a house upon the land of the lessor, not being parcel of the demise, is a collateral covenant not binding on the assignee. The distinction may be between covenants of this sort which are in the nature of rent, and those which are not. But however this may be, the decision does not impugn, but confirms the doctrine laid down in all the cases, that the assignee is not bound by, nor is he entitled to the benefit of a covenant, unless there is a privity of estate between the covenanting parties.

Considering this principle as well established by the cases cited, and many others not adverted to, we are of opinion that this action cannot be maintained, as there was no privity of estate between the covenanting parties. Their estates were several, and there was no grant of any interest in the real estate of either party, to which the covenants could be annexed. The stipulations in the indenture cannot be construed as grants and covenants at the same time. If they were grants, then an action of covenant is not the proper remedy for the violation of them; and if covenants, the assignee is not bound, for want of privity of estate between the parties.

Nor can one covenant be considered as a grant, and the other as a covenant, for the stipulations are mutual, and if one is to be construed as a grant, the other should be construed in the same manner. If the stipulation that one party is to have the first preference of the use of the water for certain mills is to be construed as a grant, the like stipulation, that the other party shall have the second preference, cannot consistently be construed as a covenant. And we ought not to give a strained construction to the indenture, for the purpose of extending the obligation of the contract to those who were not parties thereto. All the stipulations are covenants in form, were doubtless considered as such by the contracting parties, and must be so construed. As such they are mere personal covenants, according to all the authorities, and cannot be otherwise construed, without determining that all covenants concerning lands are real covenants, and binding on the assignee, however remote; which certainly cannot be maintained, either upon authority or upon principle. Such an extension of the obligation of covenants might be productive of great mischief and confusion of rights and obligations of the purchasers and owners of real estate.

*Declaration adjudged insufficient.*

NOTE. — In the following cases it was held that the burden of a covenant, made by an owner of land in favor of the owner of near-by land, that the land of the covenantor should be, or should not be, used in a specified manner, did not bind the assignee of the covenantor at law. *Sjoblom v. Mark*, 103 Minn. 193 (no liquors to be sold); *Harsha v. Reid*, 45 N.Y. 415, 418 (grist mill not to be erected); *Lawrence v. Whitney*, 115 N.Y. 410, 416 (water rights incident to land to be used in a specified manner). And there is a dictum, *accord*, in *Hurxthal v. Boom Co.*, 53 W.Va. 87, 92.

The same decision has been made, where the covenant is by a grantor, and is part of the transaction by which land is conveyed to the covenantee, the covenant being not to do acts on land retained. *Brewer v. Marshall*, 19 N.J. Eq. 537 (not to sell marl from the land); *Tardy v. Creasy*, 81 Va. 553 (not to keep a hotel).

Of course, if the covenant does not touch the land, the question, whether "privity of estate" is requisite in order that the burden should run, is not reached. See *Scholten v. Barber*, 217 Ill. 148 (covenant to pay an encumbrance on the land); *Clement v. Willett*, 105 Minn. 267 (same); *Morse v. Garner*, 1 Strob. (S.C.) 514 (grantor to have free transportation over a railroad). See also *Wiggins Ferry Co. v. Ohio Ry. Co.*, 94 Ill. 83, and similar cases, cited in the note on pp. 846-47, *supra*.

## KELLOGG v. ROBINSON.

6 Vt. 276. 1834.

THIS was an action of covenant broken, and in the county court came up for trial upon demurrer to the declaration, which was, in substance, that the defendant, by deed dated October 12th, 1824, conveyed to the plaintiff, his heirs and assigns, a certain lot of land in Bennington, in which was contained, among others, a covenant in common form, against incumbrances. — The breach is assigned as follows: —

“Yet the said Susannah did not keep her said covenant, but has broken the same; for the said Henry says, that at the time of the execution of said deed, the said land was not free from all incumbrances whatsoever. And the said Henry further says, that in the deeds of said premises from David Robinson to Noah Smith, dated in 1783 and 1797, is contained a stipulation that the said Noah is to make the whole of the fence, and to maintain the fence around said premises, or that part of said fence adjoining said Robinson’s land. And the said Noah Smith and his assigns, from the time of the execution of said deeds by the said David, down to the time of the execution of the deed of said premises by the said Susannah to the said Henry, a period of more than twenty years, were accustomed to, and did make and maintain all the fence around said premises, whereby said premises, at the time of the conveyance of the same by the said Susannah to the said Henry, were so incumbered that the said Henry and his assigns were and are liable to make or maintain all the fence around said premises, or that part which adjoins the said David Robinson’s lands, which is about 40 rods; and said premises are still charged with said incumbrance. And the said Susannah her covenants aforesaid has not kept, but has broken the same. — To the damage of the plaintiff, as he says, the sum of five hundred dollars,” etc.

To this declaration the defendant pleaded her general demurrer, and also assigned the following special causes of demurrer, to wit: “That the said Henry has only made a general assignment of the breach of said covenant, neglecting the words of the covenant, and has not, in his said declaration, averred any facts in his pretended special assignment of the breach of said covenant which constitute an incumbrance on said premises. — And this she is ready to verify. Wherefore,” etc.

To which general and special demurrer the plaintiff joined.

Judgment of the court was for the plaintiff.

Whereupon, exception was taken by the defendant, which was allowed and certified.

PHELPS, J. The sufficiency of this declaration depends upon the inquiry, whether it shows, upon its face, a subsisting legal incumbrance upon the land conveyed. It is argued, on one side, that the "stipulation," as it is termed, in the deed from David Robinson to Noah Smith is in the nature of a mere personal covenant between the parties to that deed, not running with the land, nor binding upon the subsequent grantees. On the other hand, it is insisted, that the obligation attends the inheritance, and is of course an incumbrance upon the land, into whatever hands it may pass.

There are certain covenants concerning the realty so necessarily connected with it as to pass with it of necessity, and operate between other parties than the original parties to the covenant. Of this nature is the covenant of warranty in the deed of bargain and sale — a covenant against waste — a covenant to repair buildings — a covenant not to cut timber, or plough up meadow land, and the like. The reason why these covenants run with the land is, that unless they do so, they cannot be effectual; nor can the party for whose benefit they are created derive from them the benefit intended.

There is another class of covenants of a doubtful or equivocal character, and which may be treated either as merely personal, or as annexed to and running with the land. With respect to these, it is doubtless competent for the contracting parties to make them either the one or the other, as they think expedient. When, therefore, the party covenants for himself and his assigns, it evinces an intent to bind the land, and the obligation becomes connected with, and qualifies his estate. Thus it is said, in *Spencer's Case*, 5 Coke's Rep. 16, "if lessee covenants for himself and his assigns, to build a new wall upon the land, this shall bind the assignee, *because named, and he is to take the benefit thereof.*"

The latter part of this reason, however, has reference to another class of cases, where the thing covenanted for has no necessary connection with the land, and with respect to which no tenant could legally bind another. Thus it is said by Coke, "But although the covenant be for himself and his assigns, yet it is otherwise, if the thing to be done be *merely collateral to the land and not concerning the thing demised in any sort*, as a covenant to build a house, upon the land of the lessor, *not parcel of the demise.*"

It seems, therefore, that with respect to the question, whether a given covenant runs with the land or not, the nature and purpose of the covenant is the first criterion, and, where this is not decisive, the intent of the parties, as expressed in their deed, will determine. "When," says Lord Coke, "the covenant extends to a thing *in esse* parcel of the demise, the thing to be done is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, although he be not bound by express words; — as if the lessee covenant to repair houses," etc. But if the thing



be *collateral*, as he expressed it, and not concerning the land, the assignee is not bound if named.

What, then, is the nature of the "stipulation" or covenant in question? It is thus set forth in the declaration: "And the said Henry further says, that in the deeds of said premises from David Robinson to Noah Smith, dated in 1783 and 1797, is contained a stipulation that the said Noah is to make the whole of the fence, and to maintain the fence around said premises, or that part of said fence adjoining said Robinson's land."

We take the fence described to be the partition fence between the premises conveyed and David Robinson's land; and of course necessary to be maintained, for the benefit of the occupier. The stipulation contains two parts: 1st, "To *build* the fence." Whether the obligation thus far would be considered as running with the land, is perhaps somewhat questionable. In *Bally v. Wells*, 3 Wils. 25, it is said, that "if lessee covenants to build a wall, and assigns over his estate, the grantee of the reversion shall have covenant against the assignee, notwithstanding the covenant wants the word 'assigns'; yet every assignee, by accepting the possession, hath made himself subject to all covenants *concerning the land*, but not to collateral covenants. So, for a covenant which runs with the land, an action lies for or against the assignee, *although not named, quia terra transit cum onere*." Upon the authority of that case, the obligation would be held to run with the land. But it is not necessary to decide this point, as that part of the covenant has probably been long since at an end.

The second part of the stipulation is, "to maintain the fence," etc. This is an obligation *in perpetuum*. That it concerns the land, and is not "collateral," is not to be questioned. It is equally clear, that Robinson, the covenantee, could not have the full benefit of it, unless it runs with the land. It is not to be supposed, that the parties intended Smith should be bound after parting with the land, nor that the obligation to maintain the fence should cease with a transfer of the estate. Besides, where is the distinction between a covenant to repair houses (the case put by Coke), and a covenant to maintain the fences? Where the covenants run *in perpetuum*, there can be no difference.

It is argued, that the fence not being *in esse* at the date of the covenant, the latter does not run with the land. The decision in *Wilson* conflicts with this argument. At the same time, such a covenant certainly concerns *the land*, a thing *in esse*. The maintenance of fences is necessary to the enjoyment of the estate. And the objection is no better founded than a similar objection to a covenant to repair houses would be, upon the ground that the particular separations were not *in esse* at the date of the covenant.

If we consider the fence itself as the principal thing, yet the argu-

ment has no better foundation. The first part of this stipulation is satisfied by building the fence: then comes the latter part, to *maintain* it; which, when it becomes operative, concerns a thing *in esse*. It has reference to a thing contemplated as existing, and which must actually exist when the covenant takes effect. If we regard the stipulation in the light of a condition of the grant, and in a deed poll, it could hardly be otherwise — all difficulty vanishes. If it be a *condition*, instead of a covenant, whoever takes the estate, takes it *cum onere*. We are of opinion upon the question, that a covenant in a conveyance, to build and maintain the fences, runs with the land.

NOTE. — See, *accord*, *Hazlett v. Sinclair*, 76 Ind. 488; *Kentucky R.R. Co. v. Kenney*, 82 Ky. 154; *Bronson v. Coffin*, 108 Mass. 175; *Huston v. Cincinnati R.R. Co.*, 21 Ohio St. 235. But *cf.* *Railway v. Bosworth*, 46 Ohio St. 81.

There is some authority that the burden of covenants, other than covenants of fencing, run with the land at law (provided such covenants concern the land), even if there is no "privity of estate" within the doctrine of *Morse v. Aldrich*, *supra*, and *Roche v. Ullman*, *supra*. See *Howard Co. v. Water Lot Co.*, 53 Ga. 689 (grantee covenants to pay a portion of the expense of maintaining a dam on other land); *Atlanta Ry. Co. v. McKinney*, 124 Ga. 929 (grantee of a water right covenants to convey part of the water to land owned by the grantor); *Peden v. Chicago Ry. Co.*, 73 Iowa 328 (dictum that if a grantee of land covenants to make a certain disposition of the water on his land, the burden runs).

In *Dorsey v. St. Louis R.R. Co.*, 58 Ill. 65, A granted to a railroad company, and the company covenanted to erect and maintain fences, crossings, and a depot. The company was not then authorized to transfer its property. Later, by authority of the legislature, it transferred its property to the defendant, and the defendant was held bound by the covenant. The ground of the decision was that the legislature must have intended that the assignee should be charged with such obligations of the assignor.

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SEXAUER v. WILSON.

136 Iowa 357. 1907.

PLAINTIFF conveyed to John Wilson ten acres of land out of a half section then owned by him, and in the deed inserted this clause: "The grantee herein further agrees to perpetually maintain a tight fence sufficient to stop hogs and all other live stock between said land described above and all property of the grantor herein adjacent thereto." No line fence then existed, but Wilson erected partition fences, as agreed, soon thereafter, and maintained them during his

occupancy of the premises, from 1889 until 1904, when he conveyed the land to defendant Krausa. The latter immediately took possession, but failed to keep the fences in repair. Finally, plaintiff repaired them at an expense of \$18, for which he seeks recovery. Upon proof of the foregoing facts, the court directed a verdict for defendants. From judgment entered thereon, the cause being properly certified, plaintiff appeals. *Affirmed* as to Wilson. *Reversed* as to Krausa.

LADD, J. Having found that the covenantor's grantee is bound by the covenant, the next inquiry is whether the covenantor also is liable thereon subsequent to parting with the title. This necessarily depends on the intention of the parties to the first deed. While the covenant is personal in form, this is not controlling, for the deed must have been executed with the understanding that (1) Wilson, the grantee, would have no right to enter on the land after passing title to another in order to repair or replace the fence; (2) that he would enjoy no benefit therefrom; and (3), owing to the nature of the covenant, neither he nor his representatives could perform by maintaining the fence perpetually. Of necessity the grantor must have relied on the land with which the covenant runs to secure its performance, and, fairly construed, Wilson's obligation was to make the fence and maintain it only during the time he owned the land. It could not have been his intention to assume an obligation *in perpetuum*, and, in event of disposing of the fee, to remain bound for life. On the other hand, the grantor naturally had in mind recourse on those who should own the land when the fence should need repair, rather than this grantee, who might be gone before this would be required. This conclusion seems reasonable, and has the support of *Hickey v. Railway*, 51 Ohio St. 40 (36 N. E. 672, 23 L. R. A. 396, 46 Am. St. Rep. 545). It follows that the district court rightly dismissed the petition as to Wilson.

NOTE. — On the liability of the covenantor, after parting with the land, see also *Standish v. Lawrence*, 111 Mass. 111; *Clark v. Devoe*, 124 N.Y. 120.



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